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IN THE SUPREME COURT OF FLORIDA

Case No. 33,109

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY,

Petitioners,

v.

CITY OF TALLAHASSEE,

Respondent.

PETITIONERS' REPLY BRIEF ON CERTIFIED QUESTIONS

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and HOWARD DIXON
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Petitioners,) PETITIONERS' REPLY BRIEF ON CERTIFIED QUESTIONS

v.)

CITY OF TALLAHASSEE,)

Respondent.)

---)

Petitioners reply to Respondent's Brief as follows:

1. Respondent's reliance upon American Ry. Exp. Co. v. Weatherford, 93 So. 740 (Fla., 1922) for purposes of explaining certiorari procedure (Respondent's Brief, pp. 8, 19-20) is ill-founded since the procedure described in Weatherford has been outmoded for over twenty-five years, i. e., ever since Supreme Court Rule 28 became effective on February 15, 1939. Rule 28 was the precursor of Rule 22, upon which, in turn, Rules 4.5 (c) (1)-(5) of the present Florida Appellate Rules are based and which govern certiorari proceedings today. A discussion of this significant change in procedure is set forth in the article styled "Certiorari in Florida" in 4 Fla. L.R. 477, 516-520 (1951), where the authors state:

> "Under the common law procedure followed in Florida prior to the time Supreme Court Rule 28 went into effect, a petition for a writ of certiorari would set forth reasons

why the Court should grant the writ; and, if the Court was sufficiently impressed and wanted in its discretion to hear the case, it would issue the writ to require the lower court to send up the record, by certified copy, for inspection. In theory at least, the petitioner would not in the first instance argue the merits of his case at all, but would simply attempt to persuade the Court that it should hear the case. At this point, if it did not want to hear the case, it would 'deny' the writ; and that ended the matter.

If, however, petitioner persuaded the Court to hear the case, it would 'grant' or 'issue' or 'allow' the writ, commanding the lower court to certify up the record. The record constituted the 'return' to the writ and, as has been mentioned, the petitioner had the responsibility of seeing to it that the record reached the higher court.

The writ having been issued and return made, the Court then, for the first time, got to the merits of the case. Petitioner and respondent submitted briefs and the Court heard oral argument. Having considered the respective contentions of petitioner and respondent, it disposed of the case either by quashing the writ, if respondent prevailed, or by quashing the judgment complained of, if petitioner prevailed." . . .

* * *

When the writ had issued, the respondent could attack it by motion. Before the return, the proper method of attack was by 'motion to supersede'; after the return, a motion to quash was proper. But such motions were not ordinarily necessary, because even without them the Court, having issued the writ, would either quash it or quash the judgment below. And when the court had improvidently allowed the writ, it could be quashed either on motion of the respondent or by the Court on its own motion.

Rule 28 changed all this. A summary procedure has now been substituted for the common law

> procedure formerly in use. No longer does any 'writ' issue, and no 'return' to any writ is made. Today, instead of petitioning for the issuance of a writ, procuring a return thereto consisting of the record below, and then arguing the merits of the case orally and by brief, petitioner files with his petition, in the first instance, both the transcript of record and his brief; and in the petition, as well as in the brief, he argues the merits of his petition." ...

2. Flash Bonded Storage Co., Inc., v. Ades, 12 So. 2d 164 (Fla., 1943) does not conflict with the Petitioners' position; indeed, it is direct authority for one of the arguments set forth on page 14 of Petitioners' brief, namely, that:

> "if another appeal were afforded under the guise of certiorari he would, in practical effect, have two appeals while a suitor in a tribunal of greater jurisdiction, the circuit court, would have but one." 12 So. 2d 164, 165.

3. Respondent begs the question when it argues that:

> "it should go without argument that the District Courts and this Court will always be able to review an alleged abuse of a constitutional guarantee, either of this state or of the United States." (Respondent's Brief, p. 18)

Since this is the very issue before the Court, it cannot be resolved by an argument that does no more than assume its own conclusion. Again, Respondent urges "that 'conflict' or 'public interest' certiorari could be had at this court, upon proper certification by a District Court" (Respondent's Brief, p. 11). However, neither authority nor reasoning are presented to support this assertion. Respondent also engages in self-

contradiction when it urges that full review of all the issues would have been available, but then concedes that such review is "short of an additional appeal on the merits" (Respondent's Brief, p. 11).

4. The denial of certiorari by the United States Supreme Court in Speed v. City of Tallahassee, 356 U.S. 913 and Steele v. City of Tallahassee, 365 U.S. 834 tells us nothing of the basis for that Court's rulings therein, since, as is typical in such cases, the Court gave no reasons for its rulings. Obviously, the pendency of the Certified Questions herein negative any implication that the United States Supreme Court reached any decision whatsoever in Speed and Steele on the issue of the exhaustion of State appellate remedies.

5. Robinson v. State, 132 So. 2d 3 (Fla., 1961) involved simply the issue of lack of appellate jurisdiction of the Circuit Court. It did not provide a definition of the term "the essential requirements of law" with which we are confronted in the instant case.

DeGroot v. Sheffield, 95 So. 2d 912 (Fla., 1957) was a mandamus proceeding, and Lorenzo v. Murphy, 32 So. 2d 421 (Fla., 1947) was a prohibition proceeding. Any references therein to the scope of common law certiorari are mere dicta, which can hardly be deemed to prevail over the holdings of the cases cited in Petitioners' main brief.

6. Respondent argues that: "There is no limitation that /certiorari/ be confined to naked procedural rules and

deviations therefrom". (Respondent's Brief, p. 8). Petitioners cited some 18 cases in their main brief which squarely held that the phrase "essential requirements of law" embraces only procedural matters. Respondent commented - and erroneously - only upon 2. Clearly this weight of authority, and the reasons underlying it, cannot be cavalierly dismissed simply by ignoring it and pretending it does not exist within our jurisprudence.

7. Petitioners stated in their main brief that they had found no cases decided by this Court or any of the District Courts of Appeal where common law writs of certiorari were issued and judgments quashed on the ground that convictions by a municipal court or other trial court had constituted an undue burden on interstate commerce in violation of the interstate commerce clause of the Federal Constitution. American Ry. Exp. Co. v. Fogenbush, 144 So. 320 (Fla., 1932), cited by Respondent, does not conflict with Petitioners' position in this regard. While it was agreed therein that the shipments of vegetables were in interstate commerce, and while the Court discussed the then existing federal rule regarding the presumption of negligence and the burden of proof, (since this case arose prior to Erie Railroad v. Tompkins) the Court decided the case in a manner that was independent of any question of federal law. The Court said:

> "Whether the federal rule has or has not modified the common law rule as to presumption and burden of proof is not necessary for us to decide under the facts of this case. The facts of

the particular case may control the answer to this question". 144 So. 320, 322.

Not only did the decision not involve any determination of federal law, but the case was in no way analogous to the issue presented in the case at bar, i. e., whether given State action imposed an undue burden on interstate commerce. The fact that the acts in Fegenbush occurred within the context of interstate commerce, therefore, did not of itself transform the case into one involving a holding on a question of federal constitutional law. The holding appears simply to have been that there was insufficient evidence to support a finding of negligence on the part of the petitioner with respect to the shipment of lettuce, and that there was sufficient evidence of negligence with respect to the shipment of beans.

Any importance of Fegenbush with respect to the central issues in the case at bar lie in the statements of the court therein that:

> (1) "In certiorari we do not weigh the effect of the evidence; we can reach it when a wrong rule of law is enforced as to its application." 144 So. 320, 322; and
>
> (2) "The judgment against the carrier as to /the lettuce/ could not be reached except by application of a wrong rule of law". 144 So. 320, 323.

The Court, however, did not state what the "wrong rule of law" was, and failed to indicate what, if any, erroneous charge the trial court may have given to the jury. While the Court initially discussed the conflicting rules as to the burden of proof and

presumption of negligence then prevailing in the several jurisdictions, it appeared to find this conflict irrelevant when it said that:

> "Whether the federal rule has or has not modified the common law rule as to presumption and burden of proof is not necessary for us to decide under the facts of this case". 144 So. 320, 322.

Fegenbush appears to Petitioners as an enigma. The Court said that it would not weigh the evidence; but in failing to announce what "wrong rule of law" had been applied, it appears to have done just that, i. e., weigh the evidence. Was this a decision based upon any substantive rule of law other than that there must be sufficient evidence to support a finding of negligence? Petitioners suggest that the case may represent an isolated deviation from the proposition sometimes stated that the sufficiency of the evidence will not be examined on certiorari, and that certiorari jurisdiction will obtain only if there is a complete lack of any evidence whatsoever. See, e. g., Mathews v. Metropolitan Life Insurance Company, 89 So. 2d 641 (Fla., 1956); and Flash Bonded Storage Co., Inc. v. Ades, supra.

If on the other hand, Fegenbush stands for the proposition that common law certiorari will lie in any case where the lower courts applied a "wrong rule of law", whether it be a matter of substance or procedure, then Fegenbush is in utter conflict with the 18 cases cited by Petitioners in their main brief, and should be discredited or at least clearly distinguished in the Court's decision in the case at bar.

In conclusion, counsel for Petitioners, as officers of this Court, most respectfully submit that the Court should, in deciding the case at bar, reconcile any conflicts, whether real or only apparent, with respect to common law certiorari jurisdiction and thus furnish both bench and bar with reasonably predictable guides for the future, and guides which, of course, will conform to the constitutional command that appellate judgments of Circuit Courts, rendered pursuant to Article V, Sec. 6 (3), shall be "final", and which will be in harmony with the overall appellate structure of Article V.

Respectfully submitted,

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ALFRED I. HOPKINS

By _____
Alfred I. Hopkins

CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing Petitioners' Reply Brief on Certified Questions were mailed to Respondent's Attorneys, ROY T. RHODES, City Attorney, 102½ South Monroe Street, Tallahassee, Florida; EDWARD J. HILL, City Solicitor, Midyette-Moore Building, Tallahassee, Florida, and RIVERS BUFORD, JR., Assistant City Attorney, Midyette-Moor Building, Tallahassee, Florida, this 21st day of February, 1964.

ALFRED I. HOPKINS

Rec'd
1/22/64

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BRIEF OF PETITIONERS ON CERTIFIED QUESTIONS

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CITY OF TALLAHASSEE,

Respondent.

BRIEF OF PETITIONERS ON CERTIFIED QUESTIONS

STATEMENT OF THE CASE

This cause is before the Court pursuant to an Order entered on December 2, 1963 by the Supreme Court of the United States in Case No. 35, October Term, 1963, in conjunction with proceedings for the issuance of a writ of certiorari directed to the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida. The jurisdiction of this Court has been invoked pursuant to Rule 4.61 of the Florida Appellate Rules and the within brief is submitted pursuant to this Court's Order herein dated December 10, 1963.

Petitioners were convicted of unlawful assembly by the Municipal Court in and for the City of Tallahassee on June 22, 1961, pursuant to Sec. 23-38 of the 1957 City of Tallahassee Code, which ordinance incorporates by reference the State unlawful assembly statute, F. S. § 870.04. Petitioners filed an appeal to the Supreme Court of Florida wherein they endeavored to invoke this Court's appellate jurisdiction pursuant to Art. V, § 4(2) of the Florida

Constitution (Case No. 31,121). The Respondent City of Tallahassee moved to dismiss the appeal, and subsequently the Court entered an order, dated November 1, 1961, construing the motion as a motion to transfer and transferred the cause to the Circuit Court for the Second Judicial Circuit.

The Court also filed an Opinion dated November 1, 1961 (134 So. 2d 228) setting forth the reasons for the transfer of the cause.[1] Thereafter the matter was argued on the merits before the Circuit Court, and that Court entered an order, dated August 16, 1962, affirming the judgments. (This order is set forth in the appendix to the above order of the Supreme Court of the United States, and as it contains an elaborate resume of the facts in the case, Petitioners do not reiterate them in this brief. In addition, Petitioners also submit as an appendix hereto their main brief on the merits as filed with the United States Supreme Court, which contains Petitioners' own statement of the facts and which takes issue with certain of the assumptions and conclusions of the Circuit Court.)

Petitioners endeavored to file a petition for a writ of certiorari with the District Court of Appeal for the First District, which petition, having been filed late, was withdrawn. Petitioners then filed a timely petition for a writ of certiorari in the Supreme Court of the United States, which petition was granted. During the course of the oral argument thereon, the Court directed counsel to file supplemental briefs on the question of the Court's jurisdiction in the premises. Following the filing of these briefs, the United

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1 See p. 11, post.

States Supreme Court thereupon entered the above order of December 2, 1963, wherein it certified the questions set forth below.

ARGUMENT

CERTIFIED QUESTION 1

> "1. On a timely petition for writ of certiorari or other process, does the Florida District Court of Appeal or any other court of Florida have jurisdiction to review a judgment of the Circuit Court affirming a conviction in the Municipal Court of a violation of a municipal ordinance which incorporates a state statute by reference, where the questions presented for review concern the federal consitutionality of the ordinance on its face and as applied?"

Petitioners submit that the District Court of Appeal for the First District has jurisdiction to review such a judgment pursuant to common law certiorari proceedings, but only if the questions concern the jurisdiction of the trial court or the circuit court, or concern matters of procedural law.

Article V, § 6(3) of the Florida constitution confers upon the Circuit Courts "final appellate jurisdiction . . . of all cases arising in municipal courts". There is no other provision of Florida law allowing any further appeal from such appellate judgments of the Circuit Courts. The only mode of further appellate relief from any such final appellate judgment of a Circuit Court is the limited review under common law certiorari. Jurisdiction to issue such writs is vested solely in the District Courts of Appeal, and, in accordance with F.S. § 35.02, only the District Court for the First District may exercise such supervisory juris-

diction over the Circuit Court for Leon County.

That the Supreme Court itself no longer possesses such jurisdiction was made clear in two recent cases. In Robinson v. State, 132 So. 2d 3, 5 (Fla., 1961) this Court held that it:

> "no longer has extensive power to issue so-called 'common law writs of certiorari' to review judgments of lower courts. This power is now vested in District Courts of Appeal and Circuit Courts by Article V, Sections 5 and 6, Florida Constitution. In situations in which review of a judgment or decree of a lower court is not otherwise provided for, the District Courts of Appeal are endowed with powers of review limited to a determination of whether the judgment constitutes a deviation from the essential requirements of the law. In a general way, this is the type of so called common-law certiorari power exercised by this Court prior to the effective date of amended Article V, on July 1, 1957."

Likewise in Ramagli Realty Co. v. Craver, 121 So. 2d 648, 651 (Fla., 1960) the Court stated that:

> "Amended Article V of the Constitution limits the power of the Supreme Court to issue writs of certiorari to the district courts in certain matters and to commissions established by law. The Supreme Court no longer possesses the power to issue so called 'common law writs of certiorari.' Such writ may be issued only by the district and circuit courts."

The exercise of common law certiorari jurisdiction over a final appellate judgment of a Circuit Court is limited to quashing the judgment below where the trial court or the Circuit Court acted without jurisdiction, cf. Aguilera v. City of Miami, 115 So.

2d 421 (Fla. App., 1959), or acted in violation of the essential requirements of law.[1] Petitioners here have not questioned the jurisdiction of either the Municipal Court or the Circuit Court; consequently, the issue before the Court is the meaning and scope of the term"essential requirements of law" and its applicability to this cause. Petitioners understand this phrase to embrace only matters of procedure, and the District Court of Appeal for the First District, in cases arising subsequent to the adoption of the revised Article V of the Florida Constitution, has explicitly so held. Thus, in Townsend v. State, 97 So. 2d 712 (Fla. App., 1957), the Court held that:

> "the circuit courts when sitting as courts of appeal have unassailable discretion to review or not to review charges to the jury as to which no objection was interposed at the trial.
>
> "The constitution of 1885, as amended (art. V. Sec. 6, F.S.A.) vests circuit courts with final appellate jurisdiction of all civil and criminal cases arising in the county court, or before county judges' courts, of all misdemeanors tried in criminal courts of record, and of all cases arising in municipal courts, small claims courts and courts of justices of the peace. It is reaffirmed by F.S. § 924.08, F.S.A. Our supreme court has repeatedly held that the final appellate jurisdiction of the circuit courts

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1 The Court has, of course, distinguished the scope of review in cases involving certiorari directed to quasi-judicial tribunals and certiorari directed to a final appellate judgment of a circuit court. "In the first . . . the record can be examined only to ascertain whether such courts have strayed from the bounds of their jurisdictional powers; in the second, the examination will extend to a determination of the question whether they have acted strictly according to law; and errors and irregularities committed by them will be corrected." Wilson v. McCoy Mfg. Co., 69 So. 2d 659, 664 (Fla., 1954). Nor does the instant case involve the extraordinary use of common law certiorari for review of interlocutory orders in actions at law. See, e.g., Kilgore v. Bird, 6 So.2d 541 (Fla.,1942).

may not be circumvented or frittered away by the device of appeal or certiorari. Pleger v. State, Fla., 68 So. 2d 371; Lopez v. State, Fla., 66 So. 2d 807. (Emphasis in original)

"An error that warrants quashing a judgment on certiorari must be so flagrant as to constitute a departure from the essential requirements of law with respect to procedural steps necessary to be taken or followed in order to administer justice according to controlling and indispensable rules of law." (Emphasis supplied) 97 So. 2d 712, 713

To the same effect was State v. Smith, 118 So. 2d 792, 795 (Fla. App., 1960) where the same Court held that:

" . . . certiorari may not be used in this court for the purpose of securing a second appeal, nor to produce the merits for review on appeal." (Emphasis supplied)

Likewise, in State v. Katz, 108 So. 2d 60 (Fla. App., 1959) the Court of Appeal for the Third District held:

"Due regard for the plain language of the constitution prevents this appellate court from entertaining a second appeal. The common law writ of certiorari was not meant for and may not be diverted to such purpose." 108 So. 2d 60, 61. (Emphasis supplied)

Accord: Nation v. State, 22 So. 2d 219 (Fla., 1945) where the Court held that:

"The common-law writ of certiorari issues, not to serve the purpose of an appeal, or to give an aggrieved party a second appeal, but to cause the record of an inferior court to be brought up in order that a superior court may determine from the

face of the record whether the inferior court has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of law."

These decisions all adhere to very earliest pronouncement of the Supreme Court in Basnet v. City of Jacksonville, 18 Fla. 523, 526 (1882), where the Court stated that:

"A decision made according to the form of law and the rules prescribed for remedying it, although it may be erroneous in its conclusion as to what the law is as applied to facts, is not an illegal or irregular act or proceeding remediable by certiorari."

That this writ corrects only procedural irregularities and does not embrace a further review of the substantive merits of a case was clearly and forcefully reiterated some seventy years after Basnet in American National Bank of Jacksonville v. Marks Lumber and Hardware Co., 45 So. 2d 336, 337 (Fla., 1950) where the Court stated:

"Here no contention is made of a want of jurisdiction in either of the lower courts. Was there an illegality of procedure? Bear in mind that to justify the issuance of certiorari the announced rule refers to illegality of procedure, not an erroneous proceeding. In determining whether there exists a departure in the essential requirements of law we ascertain whether the court proceeded consistent with the basic principles of law relating to the procedure to guide to an ultimate determination of the cause.

* * * *

"If peradventure it appears to some that the error was of sufficient magnitude as to cause a miscarriage of justice, it will still not justify the issuance of the writ to have a further review because that would pit the judgment of the Supreme Court against that of the Circuit Court. The Constitution never contemplated or provided for that. In this class of cases we are concerned with the character of error instead of its degree." (Emphasis supplied)

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1 With regard to the record, our present practice, under Rule 4.5 (c)(1) of the Appellate Rules, provides that the petition, unless otherwise ordered by the Court, "shall be accompanied by a certified transcript of the record . . . or so much thereof as is essential".

The foregoing case has been cited with approval in at least two subsequent decisions, namely, Wilson v. McCoy Mfg. Co., 69 So. 2d 659, 664 (Fla., 1954) and In Re Dahl's Estate, 125 So. 2d 332, 337 (Fla. App., 1960).

In the years between Basnet and American National Bank numerous other decisions announced the same rule. Thus, in Brinson v. Tharin, 127 So. 313, 316 (Fla., 1930), the Court stated that:

> "The writ, confined to its legitimate scope, may issue within the court's discretion at any time to correct the procedure of courts wherein they have not observed those requirements of the law which are deemed to be essential to the administration of justice." (Emphasis supplied)

Accord: Edwards v. Knight, 132 So. 459 (Fla., 1931) and 139 So. 582 (Fla., 1932); Gilbert v. State, 124 So. 1 (Fla., 1929); Harrison v. Frink, 77 So. 663 (Fla., 1918). And the court has frequently announced that common law certiorari will not lie simply to correct errors of law made below on the merits of the cause. Thus, in Hamway v. Seaboard Air Line Ry. Co., 136 So. 628, 630 (Fla., 1931) the Court said:

> "Even if the trial court is deemed to have erred in its conclusion as to the law applicable to the facts in the case, the error may not be reviewed on certiorari where the writ is addressed to the circuit court as the court under the Constitution of final appellate jurisdiction."

Likewise, in Morris v. State, 148 So. 182, 183 (Fla., 1933) the Court said that:

> "The Supreme Court on certiorari cannot quash a judgment merely because reversible error was committed. The error complained of as ground for quashing a judgment on certiorari must be so flagrant as to constitute a departure from the essential requirements of the law with respect to procedural steps necessary to be taken or followed in order to administer justice according to controlling and indispensable rules of law." (Emphasis supplied)

Again, in Des Rocher v. Watkins Towing Co., 143 So. 768, 770 - 771 (Fla., 1932) the Court said:

> "Some confusion may have arisen over late decisions of this court as to the power of the court to review on certiorari judgments of circuit courts in cases appealed from a civil court of record involving questions presented by bills of exception similar to those raised in this case."

The Court noted however that:

> "The matters which we have referred to and sought to be brought to our attention by the petitioner in this case were presented to the circuit court upon writ of error. If we should quash the judgment of the circuit court because of the rejection of evidence offered in the trial court or because the civil court of record made erroneous rulings on objections to questions propounded witnesses, we 'would confound the supervisory power of this court with its appellate jurisdiction.' It was never intended for this court to correct on certiorari merely erroneous rulings of a civil court of record on the law and the evidence. 11 C.J. 105. We fully realize that courts having final appellate jurisdiction sometimes err. That fact, however, does not justify us in assuming appellate jurisdiction that is vested in another court by the organic law."

To like effect are F. E. C. Ry. Co. v. Anderson, 148 So. 553 (Fla., 1933) and Vanderpool v. Spruell, 139 So. 892 (Fla., 1932), where the Court held that erroneous jury charges, which might constitute reversible error on appeal, did not furnish a predicate for certiorari jurisdiction. Again, in Farnham v. Caldwell, 193 So. 286, 287 (Fla., 1940) the Court repeated that:

> "Upon a certiorari directed to the circuit court as an appellate court, the Supreme Court will not question the correctness of the judgment of the Circuit Court upon its merits."

Accord: Peaden v. State, 105 So. 142 (Fla., 1925).[1]

There appears to be no decision of the Florida Supreme Court or the District Courts of Appeal dealing with review by common law certiorari of an attack on a municipal ordinance on the ground of its invalidity under the Federal Constitution. There are cases, of course, where the Court has struck down municipal ordinances on such certiorari proceedings where the municipality lacked the delegated power from the legislature to enact such an ordinance and where the municipal court therefore lacked jurisdiction in the premises. See Malone v. City of Quincy, 62 So. 922 (Fla., 1913) and Mernaugh v. City of Orlando, 27 So. 34 (Fla., 1899). And cf. Hunt v. City of Jacksonville, 16 So. 398 (Fla., 1894), where certiorari was sought and denied in an attack on a municipal ordinance on the ground that it failed to provide for a jury trial. These cases, however, dealt not with the Federal constitutionality of the ordinances as matters of substantive law, but rather with the traditional issues of jurisdiction and procedure.

Petitioners submit that the issues in the case at bar can in no way be characterized as matters of mere procedural or adjective law, and consequently, in accordance with the foregoing citations, the writ of common law certiorari would not issue where, as here, the validity of the ordinance as applied, does not relate to or affect the jurisdiction of, or the procedure followed by

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1 While the issuance of the writ is discretionary, Hilkmeyer v. Latin American Air Cargo Expediters, 94 So. 2d 821 (Fla., 1957), it would appear that that discretion is exercisable only where the usual jurisdictional prerequisites obtain. Thus, Hilkmeyer involved a procedural issue, viz., the appropriate provinces of judge and jury as fact-finders. Moreover, the court cited with approval both Brinson v. Tharin and Nation v. State, supra.

the courts below.[1]

CERTIFIED QUESTION 2

"2. If the District Court of Appeal or any other court of Florida does have such jurisdiction and had granted review in this case by way of a writ of certiorari or other process, would it have been empowered to consider fully each of the following contentions, all indisputably properly preserved:

(a) 'Petitioners were peaceable and orderly at all times; hence, there was no evidence whatsoever to support the convictions below for unlawful assembly, and therefore Petitioners have been denied due process of law under the Fourteenth Amendment';

(b) 'The convictions constituted a violation of Petitioners' rights of freedom of speech and freedom of assembly as guaranteed by the Fourteenth Amendment';

(c) 'The arrests and convictions herein constituted an undue burden on interstate commerce in violation of the interstate commerce clause of the Federal Constitution';

(d) 'The arrests and convictions herein constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment'?

If not, in what respects would the scope of review have been limited?"

Petitioners submit that even though the District Court of Appeal has certain powers of review by way of common law certiorari

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1 It should be noted that Petitioners have at no time questioned the validity of the ordinance on its face. When the cause was previously here on Respondent's motion to dismiss the earlier appeal, the Court held that:

> "It is perfectly clear that the municipal judge was not confronted by the necessity of passing directly on the validity of a state statute. The most that could be said would be that he was called upon to pass upon the validity of a municipal ordinance. In actuality, the record indicates that he was merely requested to decide that 'the statute' was invalid 'as applied to the appellants.' The real contention asserted before the trial judge questioned the application of the statute, rather than its fundamental validity." Dresner v. City of Tallahassee, 134 So. 2d 228, 229 (1961)

proceedings, nevertheless, its jurisdiction is by nature and as defined by the cases, a limited form of review, and that since the issues raised by Petitioners are questions of substantive law, such certiorari proceedings would not afford the opportunity of full and complete review of all the issues, which is the sine qua non of a final judgment within the meaning of 28 U.S.C. § 1257. Largent v. Texas, 318 U.S. 148; 87 L.Ed. 873; 63 C.Ct. 667 (1943). Cf. Tucker v. Texas, 326 U.S. 517; 90 L.Ed. 274; 66 S.Ct. 274 (1946); Talley v. California, 362 U.S. 60; 4 L.Ed. 2d 559; 80 S.Ct. 536 (1960).

1. With regard to Petitioners' first defense, set forth above as Certified Question 2(a), some of the decisions of this Court have held that the writ of common law certiorari will lie where there is an "entire absence of essential evidence with resulting material injury". See, e. g., Haile v. Bullock, 91 So. 683 (Fla., 1922), distinguished in Brinson v. Tharin, 127 So. 313 (Fla., 1930). Other cases have added a further variant on the definition of common law certiorari, namely, cases where the lower court failed to apply a "correct principal of law" to admitted facts. See, e. g., Mathews v. Metropolitan Life Insurance Company, 89 So. 2d 641 (Fla., 1956) and Martin v. Powell, 101 So. 2d 610 (Fla. App., 2d Dist., 1958). But even this ostensible expansion of the scope of the writ appears to be simply another way of stating that there must be evidence to support the judgment, and such appears to have been the explanatory rationale of the majority of the Court in Richard Store Company v. Florida Bridge & Iron Inc., 77 So. 2d 632 (Fla., 1955) (and in which case the Court was closely divided on the issue of the scope of review.)

However, even if it be assumed, arguendo, that the evidentiary issue thus raised by Petitioners might have been reviewed by the District Court of Appeal, nevertheless this feature of the case alone would not have formed a predicate for full review by the United States Supreme Court of all four of the issues raised by Petitioners in these proceedings.

With regard to their three other defenses, set forth above as Certified Question 2 (b), (c) and (d), Petitioners have found no cases decided by this Court or any of the District Courts of Appeal where common law writs of certiorari were issued and judgments quashed on the ground that convictions by a municipal court or other trial court (1) had violated rights of freedom of speech and assembly as guaranteed by the Fourteenth Amendment to the Federal Constitution; or (2) had constituted an undue burden on interstate commerce in violation of the interstate commerce clause of the Federal Constitution; or (3) had constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. The very absence of any such cases supports Petitioners' position that common law certiorari would not lie to produce for review and action each and all of these questions of substantive Federal constitutional law. Indeed, if the writ possessed such breadth, the ultimate result would be a fusion between common law certiorari and appeal. If such plenary review and action could be had by way of common law certiorari, then (1) the designation of finality as to the Circuit Court's appellate judgments set forth in the Florida Constitution would be rendered completely meaningless; (2) litigants in municipal courts would in

effect be entitled to two appeals, Benton v. State, 76 So. 341, 343 (Fla., 1917); and (3) such unsuccessful litigants would, anomalously, have greater appellate remedies than those whose cases were tried in our circuit courts and civil courts of record.

Moreover, under the Florida Constitution, the Circuit Courts have appellate jurisdiction over judgments not only of municipal courts but also:

> "in all civil and criminal cases arising in the county court, or before county judges' courts, of all misdemeanors tried in criminal courts of record, and of all cases arising in municipal courts, small claims courts, and courts of justices of the peace." Art. V, § 6(3).

Thus, if this Court's response to the certified questions were to state that such plenary review of all four of Petitioners' defenses would have been available in this case, then it would set a precedent for a deluge of common law certiorari petitions to the District Courts of Appeal, it would endanger the entire appellate structure of Article V and it would nullify the constitutional grant of finality accorded to circuit court appellate judgments.

A nearly identical problem has been faced by this Court with regard to the scope of its own constitutional or "conflict" certiorari jurisdiction under Art. V, § 4(2) of the Constitution. The extent to which the Court has closely circumscribed its own powers in conformity with our constitutional requirements is illustrated by Karlin v. City of Miami Beach, 113 So. 2d 551 (Fla., 1959), where the Court said:

> " . . . certiorari is not to be employed indiscriminately as an added escape route to reach the objective of a second appeal. Once this court undertakes to relax the well-defined barriers which circumscribe and define its jurisdiction then the Courts of Appeal will become mere stepping stones along the ap-

> pellate way. They will become merely intermediate resting places along an arduous and expensive pathway in the appellate process. If this situation should ever come about the tremendous effort that was expended in the revision of our appellate judicial system will have come to naught and the effective and efficient administration of justice in this state will have suffered a severe blow." 113 So. 2d 551, 553.

Again, in Lake v. Lake, 103 So. 2d 639, 642 (Fla., 1958) the Court, in dealing with "conflict" certiorari, said:

> "Sustaining the dignity of decisions of the District courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own powers by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case. . . . Every man is entitled to his day in court. He is vouchsafed a fair trial and he is secured a fair hearing on an appeal which he may take as a matter of right. But he is not entitled to two appeals. . . . Justice should be done, but not overdone." (Emphasis in original)

Similarly, in Nielsen v. City of Sarasota, 117 So. 2d 731, 734 (Fla., 1960) the Court said:

> "We do not here suggest that if we had been charged with the responsibility of the Court of Appeal in the instant case we would have arrived at the same conclusion which they reached. In fact, it is altogether possible that we might have arrived at an entirely different conclusion as to the ultimate effect of the circumstantial evidence and the justifiable inferences to be drawn therefrom . . . Such a difference of view, however, is not the measure of our appellate jurisdiction to review decisions of Courts of Appeal because of alleged conflicts with prior decisions of this Court on the same point of law."

Accord: Kincaid v. World Insurance Company, 157 So. 2d 517 (Fla., 1963). Petitioners submit that all of the considerations which have led this Court to so limit its jurisdiction are equally apposite in defining and limiting the constitutional powers of the District Courts on common law certiorari proceedings and respect-

ing the finality of circuit court appellate judgments.

A further danger inherent in any expansion of the scope of common law certiorari under our present Constitution is shown by the case of King v. State, 142 So. 2d 458 (1962). There the petitioner had been convicted in a criminal court of record; the conviction was affirmed by a Circuit Court; and common law certiorari was taken to the District Court of Appeal on the ground that there had been a violation of the privilege against self incrimination because of the prosecuting attorney's comments on the petitioner's failure to testify at the trial. The District Court denied common law certiorari and the petitioner then applied for constitutional or "conflict" certiorari to this Court, which this Court granted on the ground that there was a conflict between the District Court's ruling and prior decisions of this Court. Thus, because of errors in the trial procedure, the petitioner was heard on four different levels of our judicial hierarchy. Clearly the appellate practice followed in the King case should dictate the outermost limits of common law certiorari: if its scope is not confined to matters of jurisdiction and procedure, and if it is allowed to produce the substantive merits of a case for review, then the appellate consequences will be horrendous, there will be no end to appeals, and the orderly appellate system so carefully conceived in our amended Article V will be thoroughly emasculated. If that occurs, then no attorney representing a client who has lost on the merits on appeal to the circuit court will ever be able to advise his client that he has exhausted all appellate remedies until he has (1) petitioned for common law certiorari in the District Court and (2) thereafter

petitioned for "conflict" certiorari in this Court (and borne the cost thereof). And as Respondent should realize, where municipal offenses are involved, of whatever variety, the cities will have to endure both the delays and budgetary drains caused by such proceedings. Indeed, the State as well (absent a constitutional issue and direct appeal to this Court) would face the same burden where the trial was for a misdemeanor in a criminal court of record.

With such an appellate structure, therefore, this Court would become the sole "highest court" under 28 U.S.C. § 1257 in every case, thereby depriving both the Florida Constitution and the Federal Statute of their logic and meaning.

2. Further, if the Respondent City of Tallahassee would contend that the District Court was empowered to consider fully each of Petitioners' defenses on the merits, this argument would prove too much. Since there is no issue as to the jurisdiction of the Municipal and Circuit Courts, the Respondent, to prevail, would have to argue that the judgments below violate the "essential requirements of law", for only if such violation can be shown could the District Court be deemed to have had common law certiorari jurisdiction.

Petitioners' position, supported by the case law above, is that the "essential requirements of law" comprise only procedural matters, and that their four defenses can by no means be characterized as matters of mere adjective law, and that were it otherwise, all jurisprudential distinctions between "procedure" and "the merits" would vanish and the cited cases would have drawn meaningless distinctions. But even it be assumed, arguendo, that certiorari lies

to produce the substantive merits for review, then, absent a jurisdictional dispute, the District Court would have jurisdiction to issue the writ and quash the judgment below only if it could be shown that there was a violation of the "essential requirements of law". The inexorable logic of this position would therefore require the Respondent, in effect, to plead the merits of Petitioners' case before this Court and urge that the courts below committed fundamental substantive errors amounting to a violation of the "essential requirements of law". In so doing, they must then confess error in the prosecution of these Petitioners and stand charged with administrative tyranny.

To restate the argument, if - contrary to Petitioners' position - the Respondent urges that certiorari embraces a review on the merits, then Respondent must ask this Court to find that on the merits the Petitioners are correct and that by virtue of the federal constitution there was a violation of the "essential requirements of law" on one or more of Petitioners' four defenses, since under this view, such a violation would be a necessary predicate for certiorari jurisdiction. Respondent, of course, has contended that the Circuit Court's judgment was correct - a view completely inconsistent with any jurisdictional position necessarily predicated upon there having been a violation of the "essential requirements of law."

The converse, of the above argument, however, does not follow, for the efforts of Petitioners to obtain reversal of the convictions and to deny the certiorari jurisdiction of the District Court has not implied any approval of the lower courts' judgments, since Petitioners view the phrase "essential requirements of law"

as being limited simply to matters of procedural or adjective law; consequently, Petitioners could not conceivably have had plenary review of all of their substantive defenses. The availability of such plenary review was of course essential to their obtaining full review of the cause before the United States Supreme Court if they were not to have risked abandonment of any of the defenses raised in the Florida courts, for the United States Supreme Court will not entertain a cause brought there in fragments; the adjudication must be not only final, but complete. Arnold v. United States, 263 U.S. 427; 68 L.Ed. 371; 44 S.Ct. 144 (1923). Hence, while Petitioners have urged that the courts below erred, Petitioners have not and do not now contend that these errors were the kinds of errors embraced within the meaning of the phrase "the essential requirements of law."

Thus, if this Court were to follow the urging of the Respondent and hold that there was jurisdiction in the District Court, it would therefore necessarily follow that the Circuit Court's judgment was erroneous. Following this logic still further, if the judgments below were ultimately executed and Petitioners confined in jail, the Federal District Court, upon the filing of a petition for habeas corpus, would have the law of the case already stated by this Court, namely, that the judgments of the lower courts were erroneous, and the confinements thereunder necessarily illegal. Petitioners submit, therefore, that the Respondent is faced with a hopeless logical dilemma.

3. Certified Question 2 asks if the District Court "does have jurisdiction" and had "granted review", would it have been "empowered to consider" the four contentions listed thereunder. Peti-

tioners submit that the Question must be answered in a way which clearly defines the nature of Florida common law certiorari jurisdiction. Absent a challenge to the jurisdiction of the courts below, the District Court's jurisdiction in such proceedings is ultimately dependent upon a determination of whether there has been a violation of the essential requirements of law. A party can, of course, invoke, i. e., request, the exercise of certiorari jurisdiction by filing his petition, supporting brief, and certified portions of the record, and the District Court could hear oral argument and "consider" the issues, but only for the purpose of determining if there was a violation of the essential requirements of law. If the Court concluded that there was no such violation, it would necessarily follow that the Court had no jurisdiction, i. e., no constitutional authority, to issue the writ of certiorari and no constitutional authority to quash the final appellate judgment of the Circuit Court. Obviously, the District Court, as any court, always has jurisdiction to determine its own jurisdiction. Cf. State ex rel. B. F. Goodrich Co. v. Trammell, 192 So. 175 (Fla., 1929). But the mere inquiry into the existence of its jurisdiction is not tantamount to an exertion by the court of its ultimate judicial power, and for the exercise of which the tribunal was constituted pursuant to organic law. "On writ of certiorari the ultimate adjudication is to quash the judgment or order that is reviewed or to quash the writ of certiorari." (Emphasis supplied) Cacciatore v. State, 3 So. 2d 584, 588 (Fla., 1941).

Thus the certified questions must be answered within the context and meaning of 28 U.S.C. § 1257, which provides for review

by the United States Supreme Court only of final judgments "rendered by the highest court of a State in which a decision could be had". In this regard Petitioners cite Western Union Telegraph Company v. Hughes, 203 U.S. 505; 51 L.Ed. 294; 27 S.Ct. 162 (1906), where the plaintiff had obtained a judgment in the corporation court of the city of Danville, Virginia; the defendant had prosecuted a writ of error to the Supreme Court of Appeals of Virginia; the latter Court ruled that it had no jurisdiction to entertain the writ of error and dismissed it; and the defendant then prosecuted a writ of error in the United States Supreme Court directed to the Virginia Supreme Court of Appeals. The United States Supreme Court dismissed the writ as having been directed to the wrong court, and held that:

> "Treating the order of dismissal [of the Virginia Supreme Court of Appeals] as a final judgment, we are now asked on this writ of error to reverse the ruling of the supreme court of appeals of Virginia. This, however, we cannot do. It is immaterial that the supreme court of appeals was vested by the state Constitution with appellate jurisdiction in all cases involving the constitutionality of a law as being repugnant to the Constitution of Virginia or of the United States, or that, in the opinion delivered by the court, it discussed the Federal question and declared it to be without merit. The fact is undoubted that the writ of error was dismissed solely and expressly because of a want of jurisdiction, and the effect of the formal entry, adjudging that the court was without jurisdiction to pass upon the questions presented by the writ of error, cannot be different from what it would have been had the court not given expression to its views in a written opinion. The necessary result of the ruling that the court had not jurisdiction of the writ of error was to determine that the trial court was the final court where the questions presented by the writ could be decided; and hence, the writ of error should have been directed to that court." (Emphasis supplied)

Accord: Randall v. Board of Commissioners, 261 U.S. 252; 67 L.Ed. 637; 43 S.Ct. 252 (1923).

In this regard, it appears that under our Florida common law certiorari practice, the Court either (1) quashes the writ because there is no jurisdiction to grant it, or (2) it quashes the judgment below because there is jurisdiction to issue it. Thus, in Peaden v. State, supra, this Court said:

> "The court issuing the writ will neither affirm nor reverse the judgment, nor try the case upon its merits, Basent v. City of Jacksonville, 18 Fla. 523. If, upon an inspection of the transcript of the record, including a duly authenticated bill of exceptions, it appears that the judgment or other proceedings are not in accordance with the essential requirements of the law, the judgment of affirmance will be quashed; otherwise the writ of certiorari will be quashed." 105 So. 142.

Again, in Benton v. State, supra, in quashing the writ, this Court said:

> "It appears from the record that the county judge had jurisdiction of the offense and the person of the defendant, and that the circuit court as the court of final appellate jurisdiction acquired jurisdiction in accordance with the forms prescribed by law, and acted within the limits of its jurisdiction and powers; and, no question being raised as to the validity of the act under which the prosecution was held, the proceedings of the circuit court appear to be legal, and the writ should be quashed, because in this proceeding this court has no power to inquire into the alleged error committed in admitting certain evidence - that is to say, no power to question the correctness of the judgment on its merits. It is therefore ordered that the writ of certiorari be and the same is hereby quashed." 76 So. 341, 343 (Emphasis supplied)

In this respect, therefore, common law certiorari differs radically from an appeal. On appeal the District Court, in general, has plenary power to review and act upon any and all procedural and substantive issues properly raised and preserved; it may agree or disagree with the court below; and being possessed of the requisite jurisdiction, it will enter a judgment affirming or reversing the judgment below, in whole or in part and with or without directions,

and will issue its mandate in accordance therewith. But on common law certiorari, as the Court has shown in Peaden and Benton, supra, the appellate court's very jurisdiction to issue the writ and quash the judgment below depends upon - and is in all respects coextensive with - its answer to the central question of whether there has been a violation of the essential requirements of law.

Thus, Petitioners submit, and request the Court to consider in replying to the certified questions, that a distinction must be made between the jurisdiction of the District Court to entertain certiorari proceedings and its certiorari powers. In fine, therefore, Petitioners submit (1) that the District Court would have had jurisdiction to review the Circuit Court's judgment with respect to the federal constitutionality of the ordinance only if matters of jurisdiction or procedure were involved; (2) that such issues were not involved in this case; (3) that a petition for certiorari setting forth Petitioners' four defenses would clearly have been subject to quashal; (4) that if the District Court, rather than quash the petition without oral argument, had set the matter for hearing, it would necessarily have had to conclude that it lacked jurisdiction over the cause; and (5) that any such invocation and exercise of the District Court's authority which terminated in a quashal of the petition would not have amounted to an exercise of common law certiorari jurisdiction.

CONCLUSION

A host of cases decided by the court on certiorari proceedings are collected and are the subject of scholarly commentary in 4 Fla. L.R. 447, 493 - 502 (1951). The authors, after reviewing

a number of apparent variants on the rule, concluded as follows:

> "The Court has recently held, in American National Bank of Jacksonville v. Marks Lumber & Hardware Co., that on certiorari it will review only questions of jurisdiction or irregular procedure in the lower court. This holding, if adhered to, will at long last result in getting back to the basic principles of common law certiorari so often proclaimed by the Court in its opinions, but so often disregarded in actual practice; and the judgments of circuit courts exercising final appellate jurisdiction under the Constitution will again indeed be 'final'." p. 502.

For the foregoing reasons, therefore, Petitioners submit and respectfully request this Court to answer the Certified Questions in the manner set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copy of the above and foregoing Brief of Petitioners' on Certified Questions was mailed to Edward J. Hill, Attorney for Respondent, 216 East Jefferson Street, Tallahassee, Florida, this 20TH day of January, 1964.

Alfred I. Hopkins

Rachlin

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 35

ISRAEL DRESNER, ET AL., PETITIONERS,

vs.

CITY OF TALLAHASSEE.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE STATE OF FLORIDA, SECOND JUDICIAL CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 13, 1962
CERTIORARI GRANTED APRIL 15, 1963

SUPREME COURT OF THE UNITED STATES

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[fol. A]

IN THE MUNICIPAL COURT, IN AND FOR THE CITY OF TALLAHASSEE, A MUNICIPAL CORPORATION OF FLORIDA

Case Nos. 77900-77912

CITY OF TALLAHASSEE, Plaintiff,

vs.

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. MCKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY, CHAS. A. HUNTER, JOHN J. POLAND, JR., and PRISCILLA G. STEPHENS, Defendants.

AFFIDAVIT—June 20, 1961

Before me, John A. Rudd, Judge of the Municipal Court of the City of Tallahassee, Florida, personally appeared James Messer, Jr. and Edw. J. Hill, who, being duly sworn, say that on, to-wit: the 16th day of June, 1961, upon property owned and operated by the City of Tallahassee, Florida, and located in Leon County, Florida, namely, the Tallahassee Municipal Airport, Israel Dresner, Austin M. Warner, Robert M. Brown, Petty D. McKinney, Martin Freedman, Arthur L. Hardge, Robert J. Stone, Wayne C. Hartmire, J. W. Collier, Jr., Ralph L. Roy, Chas. A. Hunter, John J. Poland, Jr., and Priscilla G. Stephens:

Count I

Did then and there unlawfully assemble in that they did, and they being more than three (3) persons, met together to commit a breach of the peace, acting together and con-
[fol. B] certedly to occupy and to continuously occupy certain chairs and seating facilities in the Tallahassee Municipal Airport, making and cancelling group airline reservations on the two (2) operating airline schedules depart-

ing Tallahassee on the said date, and on June 15, 1961, and meeting together in concert attendant with circumstances calculated to excite alarm, endanger the public peace and excite fear, and in such nature as to inspire well-grounded fear in persons of reasonable courage, of riot, or other breaches of public peace, and while so unlawfully assembled a police officer of said City did go among these persons so assembled, and making himself known to them and each of them, did, in the name of the State and City, command those so unlawfully assembled to immediately and peaceably disperse, and they and each of them did then and there refuse and/or neglect to obey such command when given, contrary to the laws and ordinances of said City in such cases made and provided, and against the peace and dignity of the said City of Tallahassee, Florida.

James Messer, Jr., City Attorney.

Edw. J. Hill, City Solicitor.

Sworn to and Subscribed before me this 20 day of June, A.D. 1961.

John A. Rudd, Municipal Judge, City of Tallahassee, Florida.

[fol. C] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. D]

IN THE MUNICIPAL COURT,

IN AND FOR THE CITY OF TALLAHASSEE,

A MUNICIPAL CORPORATION OF FLORIDA.

Case Nos. 77900-77912

CITY OF TALLAHASSEE, Plaintiff,

—vs.—

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. MCKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY, CHAS. A. HUNTER, JOHN J. POLAND, JR., and PRISCILLA G. STEPHENS, Defendants.

Transcript of Proceedings of June 22, 1961

Transcript of proceedings had and testimony taken in the above-entitled cause before the Honorable John A. Rudd, Judge of the Municipal Court, Tallahassee, Florida, on Thursday, June 22, 1961, commencing at 9:10 o'clock a.m.

APPEARANCES:

James Messer, Jr., City Attorney, City Hall Building, Tallahassee, Florida, and

Edward J. Hill, City Prosecutor, City Hall Building, Tallahassee, Florida, on behalf of plaintiff,

Tobias Simon, Esquire, 706 Ainsley Building, Miami, Florida, and

[fol. E]

Howard W. Dixon, Esquire, Seybold Building, Miami, Florida, and

Alfred I. Hopkins, Esquire, 1701 Meridian Avenue, Miami Beach, Florida, By: Tobias Simon and Howard W. Dixon, Esqs., on behalf of defendants.

* * * * * * *

[fol. 4] The Court: These defendants were arraigned on a docket entry Saturday morning, a brief description of the charge being unlawful assembly except Priscilla G. Stephens is charged in addition to unlawful assembly with interfering with a police officer in performance of his duties and resisting arrest.

Does the defense care to have a formal arraignment at this time?

Motion of Defendants to Quash and to Dismiss the Charges

Mr. Simon: At this time, if Your Honor please, the defense will move to quash and to dismiss the charges against [fol. 5] these defendants on the following grounds:

First, that the charges of the City of Tallahassee do not state an offense against the defendants under the ordinances of the City of Tallahassee or the statutes of the State of Florida.

Second, the alleged offenses occurred beyond the city limits of the City of Tallahassee and this Court is without jurisdiction to try these offenses.

Third, the statute pursuant to which the defendants were arrested and with which the defendants are charged and which they are charged with having violated, namely Florida Statutes, Chapter 61-237, is invalid and is unconstitutional, constitutes a denial of rights under the Declaration of Rights of the Florida Constitution and constitutes a denial of rights under the Federal Constitution to the United States and the 1st and 14th Amendments thereto and as a consequence these arrests were unlawful and the charges based thereon are without foundation.

Next, the defendants with constitute a party of negroes and whites who were located in a municipally owned airport in the City of Tallahassee and were attempting to use the public facilities of this airport on a racially unsegregated basis acted at all times in a peaceful and dignified manner; their arrests constitute a denial to the defendants of the equal protection of the law under the 14th Amendment to the Federal Constitution and a denial of due

[fol. 6] process of law, a denial of privileges and immunities of State citizenship guaranteed thereby; a denial of the privileges and immunities of Federal citizenship since they were at all times on and in an instrumentality of the municipality of Tallahassee and were attempting to use the facilities thereof, which facilities are required by Federal law to be made available to all citizens without regard to their race or color.

Next, the defendants at the time of the arrests were passengers in interstate commerce awaiting departure at the Municipal Airport of Tallahassee of their plane from Tallahassee to points beyond the State of Florida and their arrests constitute a violation of their rights of unfettered travel free of racial discrimination under the Interstate Commerce Clause of the Federal Constitution, namely Article 1, Section 8, Clause 3, and a violation of their privileges and immunities of Federal citizenship, a violation of the Federal Aviation laws and a violation of the Federal Aviation Act of 1958 and, in particular, Section 404 of said act, same being 72 Statute 760, 49 U.S. Code, Section 1374-B.

The arrests of the defendants and their prosecution constitute a violation of their liberty of contract as guaranteed by the 14th Amendment to the Federal Constitution.

Next, the acts of the city officials in arresting and in participating in the arrests of these defendants and these prosecutions based thereon and the concomitant failure of [fol. 7] the city officials to arrest certain other persons in the vicinity who were threatening to exhibit acts of violence because of the defendants' presence at the aforesaid airport and because of the defendants' endeavor to use the airport facilities on an unsegregated basis constitutes racial discrimination in violation of the due process clause—

The Court: Hold on a minute.

Are you making a motion, arguing a motion or are you testifying?

Mr. Simon: I am making a motion.

The Court: Leave out your facts and make the motion according to law.

Mr. Simon: (Continuing) —in violation of the Due Process Clause and the Equal Protection Clause of the 14th Amendment to the Constitution of the United States and

corresponding provisions of the Florida Constitution whereby the defendants respectfully move this Court to quash and dismiss the information and charges herein filed.

* * * * * * *

[fol. 20] Thereupon, JAMES MESSER, JR., called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Hill:

Q. State your name for the record.

A. My name is James Messer, Jr.

Q. Are you a resident of Tallahassee, Leon County, Florida?

A. I am.

[fol. 21] Q. What is your occupation?

A. I am an attorney at law; I am City Attorney of the City of Tallahassee and a special police officer of the City of Tallahassee.

Mr. Simon: I object to that answer and move that it be stricken on the grounds that it is not responsive to the question and further that the best evidence of that fact would be his license.

The Court: Objection overruled.

The Witness: If the Court please, I have this (indicating).

Mr. Hill: If the Court please, I have here a letter from the City Manager of the City of Tallahassee appointing Mr. James Messer as a police officer.

The Court: Mr. Messer just testified under oath he was these things and it is up to the defendants if they do not believe him to impeach him.

I see no need to support your own testimony.

Mr. Hill: All right.

Q. Were you such a police officer on the 15th and 16th days of June, 1961?

A. I was.

Q. Were you on duty as such a police officer on these days?

[fol. 22] A. I was.

Q. Did you on the 15th and 16th days of June, 1961 see these 13 defendants here (indicating)?

A. Yes, I did.

Q. Where did you see them on either of those days or both of them?

A. On the 15th I saw the defendants with the exception of Priscilla Stephens and John Poland at the Greyhound bus terminal in Tallahassee.

Q. You were at the bus terminal?

A. There are one or two others that I didn't see. They are named in the charges. I believe Hunter is one.

Q. You do not remember seeing Hunter?

A. I do not remember seeing Hunter; at least I couldn't identify him.

Mr. Simon: I can't hear you.

Mr. Hill: If Your Honor please, I believe that Mr. Simon can hear me.

If you are trying to harass me I will yell just as loud as I can.

Mr. Simon: I think you know that isn't the case. I simply can't hear you. You are speaking in too low a tone.

Q. What were the circumstances under which these defendants were seen by you at the bus station on the 15th [fol. 23] day of June?

A. I was requested by the Mayor, the Chief of Police—

Mr. Simon: I object on the ground the same is hearsay.

The Court: I will rule on your objection when he gets through answering.

Mr. Simon: If Your Honor please, that would destroy the effect of the hearsay rule. He is about to testify—

The Court: He hasn't said anything what he has been instructed about, Mr. Simon. Mr. Messer is familiar with the hearsay rule, I am sure, and will avoid that.

A. I was requested to go to the Greyhound bus terminal on June 15, to be there at approximately 11:30.

Q. Did you go there?

A. I did.

Q. What did you do?

A. I went into the bus terminal. There were very few persons there. Some apparently elderly people were waiting for buses and some people were seated in the lunch counter but very few people were present at the time I arrived with the exception of police officers of the City of Tallahassee, a member of the State Highway Patrol, a representative of the Sheriff's Office and representatives of the [fol. 24] Sheriff's Bureau of the State of Florida.

Q. Did you receive advance information that these people or these defendants or other people similarly situated would come into this bus station at or about that time?

A. Well, it was announced on television and I received other information which I consider to be reliable that they were to arrive about 11:30.

Q. Did they so arrive?

A. They did.

Q. Would you describe the circumstances under which they arrived, Mr. Messer?

A. There were two buses that entered the bus terminal from the entrance off of West Tennessee Street. They came in the west entrance from what is commonly referred as the loading platform and went into the bus terminal.

Q. Do you know about how many people were involved in this group and if that group was composed of these defendants?

A. I only observed their entrance. I was on duty outside of the terminal, the main entrance there at the intersection of Adams and Tennessee.

I would judge there were about some 20, maybe 25. I didn't make an actual count.

Q. Were these ten defendants that you have just referred to excluding the three that you excluded earlier in [fol. 25] your testimony, were they present?

A. Yes.

Q. What were the circumstances surrounding the bus station at that time other than the large crowd of people that you have just referred to?

A. About I would say 15 or 20 minutes before they ar-

rived a rather large crowd gathered in front of the bus terminal, across from the bus terminal, that is across Adams Street and those that Officer Daws—he was on duty inside the front door and I was outside—turned away, they had gone around and gotten in the back way some way.

There was quite a crowd in there and the police officers succeeded in getting them to leave. Then there was a group that came up to the entrance of the terminal, the front door, and attempted to go in and they were turned away.

There were rather vile epithets or rather vile language used and criticism against the Police Department for permitting the bus company to serve the Freedom Riders with food.

Q. Were these people provided with every protection that you know that was available to the City and the community?

The Court: What people? "These people" you say.

Q. This group of people that you are referring to which includes these defendants.

The Court: These ten defendants?
[fol. 26] The Witness: That's right.

A. Yes. As I pointed out there were several uniformed officers of the Police Department, there were a number of them in plain clothes, there was at least one member of the Highway Patrol and the Sheriff of Leon County was present. He had with him at least two deputies and there were representatives of the Sheriff's Bureau. I understand there were representatives of the FBI present but I couldn't identify them, but there was ample police protection afforded.

Q. I believe you have testified or if you have not may I ask you: These ten defendants you have referred to, did they come into this community or to this City in one group?

A. There were two buses. I don't know whether all of the defendants here (indicating) were riding on the same bus or not but there were two buses of the so-called Freedom Riders of which these defendants were a member.

Q. Did those buses arrive in Tallahassee at or about the same time?

A. One was following the other.

Q. Is the Greyhound terminal within the corporate city limits of Tallahassee, Florida?

A. Yes.

Q. Did this assembly or this meeting of the so-called Freedom Riders, was it in any way in your opinion—was [fol. 27] the assembly of these people, this group, these ten and those that were arriving with them, was that assembly attended with any circumstances that excited any alarm in your opinion?

Mr. Simon: I object on the grounds the witness hasn't shown to be properly qualified to render opinion evidence and further it calls for a conclusion of the witness; further that it is based, obviously, upon hearsay evidence.

Mr. Hill: May I answer that? One of the elements of common law and statutory crime or offense, that is of unlawful assembly, is whether or not in the opinion of firm and rational people in the community this assembly is calculated to excite, alarm and to inspire fear or other breaches of the peace and therefore it is perfectly competent for a man of this kind to give his opinion as to whether or not it is. Otherwise, Your Honor, no law enforcement officer or anybody under the statute could be authorized to disperse an assembly, would never have any right or authority on which to make a move.

Mr. Simon: If Your Honor please, we respectfully submit even if that is the case the proper predicate hasn't been shown in this instance.

The witness has already testified ample police protection was available.

The Court: The qualifications or predicate you would have to lay for a person to testify under this statute would [fol. 28] be that which establishes him as a responsible, level headed citizen and member of the community and knowing Mr. Messer as long as I have and as well as I do the Court takes judicial knowledge of the fact that he is such a person and the objection is overruled.

Mr. Hill: Will the Reporter please read that question back? I would like him to answer it.

(The question referred to was read back by the Reporter.)

Mr. Simon: Just a moment. I believe, Your Honor, that two witnesses for the defense have just come into the room. They were not aware of the invocation of the Rule and I would like them to be called before the bar at this time and sworn and instructed in the Rule.

The Court: All right. Call them up.

(Addressing the two witnesses) You will remain outside the courtroom and don't talk about the case with anyone except the City Attorneys and the defense attorneys and we will administer the oath at the proper time.

A. As I stated before, there was a considerable number of people assembled on the northeast corner of the intersection of Adams and Tennessee Streets just across the street from the main entrance to the bus station. A group had assembled at the front door of the bus terminal build- [fol. 29] ing. Rather vile language was used toward the defendants and efforts made by some of those assembled to enter the bus station. One of them claimed that he had special permission from the Mayor and the Mayor happened to arrive at that time and the Mayor denied having given any such permission and finally it became necessary for me to call my assistant, a uniformed member of the Police Department who was Lieutenant Gasaul (phonetic spelling), and to order him to order a dispersal of the crowd.

Q. Did they so disperse?

A. After Lieutenant Gasaul moved in. I had dispersed three or four prior to that but this large group, the one that seemed most indignant about the actions of the City of Tallahassee—

Mr. Simon: I object. I don't think that the witness is properly qualified to describe a crowd as being indignant. He can tell what he saw. I object to the conclusion.

The Court: Objection overruled.

Q. Mr. Messer, is it your opinion there was a possibility of danger to the peace and tranquility of that neighborhood at that time?

Mr. Simon: Same objection as I made before.
The Court: Objection overruled.

A. There was.
I might add that I was present at most of the sit-ins that [fol. 30] took place at the dime store and restaurants—

Mr. Simon: I object. It is immaterial and irrelevant to describe prior matters not involving these defendants.
The Court: Objection sustained.

Q. What else did you do there at that time, Mr. Messer?
A. I did nothing other than keeping people from entering the bus station that had no business there. In other words, they were not travelers, they were not going in to buy a ticket, they were not going in to take a bus.
Q. Would you say the peace was maintained at that time?
A. Absolutely.
Q. Did you at any other time on this day see these ten defendants?
A. Yes. I saw them at the Tallahassee Municipal Airport that afternoon.
Q. At about what time, please, sir?
A. I would judge about around 4:00 o'clock.
Q. What were the circumstances at that time, Mr. Messer?
A. I received a telephone call I believe from you in which you suggested—

Mr. Simon: I object. That is hearsay evidence.
[fol. 31] The Court: The statement was you received a telegram?
The Witness: I received a telephone call and in response to that call went out there.
The Court: You can testify as to what you did in response but not what the call was.
The objection is overruled.

A. I was taken out there. I believe the Chief of Police, Mr. Stoutamire, took me.
Q. This was Thursday afternoon, June 15th?
A. Yes.
Q. What were the circumstances in attendance at that time?

A. Well, it appears that the defendants who ate or finished eating about 2:20 or I judge around 2:20 went out to the airport and wanted to eat again.

Q. And were these ten defendants there at that particular time when you arrived there?

A. Yes.

Q. Were the other three defendants that you have heretofore testified were not present there?

A. I don't recall seeing them at that time, no.

Q. Were there other groups there in attendance at that time?

[fol. 32] A. No, other than passengers at the airport. There were a number of people at the entrance to the airport. I recall distinctly when we arrived there were two cars that the police officers had stopped. They were not permitted to enter the airport.

Q. Would you say that adequate police protection was being provided at the airport at that time?

A. Very definitely.

Q. Were there other law enforcement agencies there other than the Tallahassee Police Department?

A. Yes. There were members of the State Highway Patrol and members of the Police Department of the City of Tallahassee.

Q. Since you testified that these ten defendants were there, where were they within the premises of the Municipal Airport at that time?

A. They were seated on a bench there approximately in the center of the lobby of the airport terminal building.

Q. Do you know how long they had been there?

A. No, I don't. They hadn't been there too long because I saw them leave the bus terminal. I would judge that they were there approximately an hour or an hour and a half, about an hour and a half.

Q. Did you see them later on June 15th, 1961?

[fol. 33] A. I stayed out to the airport until about 5:10.

Q. Do you know whether or not any scheduled airplanes belonging to the two airlines that have facilities here, whether any of them had departed the airport after these defendants arrived?

A. No—let me state this: There was a much larger group of these—I identify them as Freedom Riders—at the bus terminal than there were at the airport when I arrived.

I arrived—it was the departure of the three twenty-five Eastern Airlines plane. Whether they took off on that or not, that is something I can't testify to.

Q. Did you see them any further on June 15th?

A. Not after leaving the airport shortly after 5:00 o'clock.

Q. Did you see these ten defendants or these 13 defendants on June 16th, 1961?

A. Yes, I did.

Q. Under what circumstances and at approximately what time, Mr. Messer?

A. I arrived at the airport at approximately, I would say, between 12:15 and 12:20—

Mr. Simon: If Your Honor please, I move to strike the answer on the grounds that it is just not responsive to the question. Of course, I don't know how the answer could [fol. 34] have been made responsive to the question because the question was "These ten or these 13 defendants, did you see them?" I don't know how he could answer that question just plain "Yes."

The Court: The question was whether or not he had seen these ten defendants or, rather, these 13 defendants on the 16th.

Mr. Simon: Yes, sir. Which is it? I think the record is entitled to show whether he saw the ten or the 13 defendants.

The Court: He corrected the ten and said 13, I believe.

Mr. Simon: Is that a correction?

A. Let me clarify it.

The Court: Clarify the question first. You asked him about ten defendants or 13?

Mr. Hill: I asked him about 13.

The Court: Now answer the question.

A. I do not recall seeing a defendant by the name of Hunter. I don't recognize him. I did see Priscilla Stephens

and I did see the defendant Jeff Poland. They were in the lobby of the airport terminal building.

Q. Are those two persons that you have just named in distinction from the other Freedom Riders as you have referred to them? Are they additional people that you saw [fol. 35] on the 16th from the ones you left there on the evening of the 15th?

A. Yes. They could have been there but I didn't see them.

Q. But they were there on the 16th?

A. Yes.

Q. What time did you say you arrived there, Mr. Messer?

A. I arrived there at approximately either—I would say between 11:15 and 11:20. Wait a minute. I beg your pardon. That is 12:15.

Q. I believe you heretofore testified that you are a police officer of the City of Tallahassee and were such on this date?

A. That's correct.

Q. What did you do then with respect to these 13 defendants?

A. I went into the city office at the airport and after conferring with the Mayor and the City Manager and the Chief of Police—I believe there was also a representative of National Airlines from the office of the airport manager's that the City has out there—I went out into the lobby to ascertain the number of persons assembled there or the identity of the persons assembled and went into the Men's Room. Then I came by the telephone booths which are in a corridor there and then went by—returned back by [fol. 36] the telephone booths to ascertain there were no persons in there and then I went back to the office of the airport manager and following that, accompanied by the Chief of the Police Department of the City of Tallahassee and Officer Bennett, I believe it is Lieutenant Bennett, I read to those assembled in the lobby, the defendants here (indicating) and—I believe Priscilla Stephens was there at that time I approached Jeff Poland who was there—I read to them the proclamation and requested them to disperse.

Q. Did you identify yourself?

A. I first—the first thing I did was to inquire as to who was the leader of their group. A person stood up and identified himself as the Reverend James W. Collier. I said, "I want to identify myself." I said, "I am—my name is James Messer, Jr. I am City Attorney and a police officer of the City of Tallahassee."

I then took from my pocket a police badge. I said, "This is evidence of my authority. I am going to read to you a proclamation."

Q. Did he attend to the reading of this proclamation?

A. He did. He stood up. I read to him the proclamation.

I have a copy of the proclamation here (indicating) which I read to him with some additions I made which I can [fol. 37] describe to the Court.

Q. Will you tell us what you said?

A. In the proclamation I said, "My name is—"

Mr. Simon: I object to the witness reading from any document which is not in evidence.

The Court: Those are notes you used at the time, Mr. Messer?

The Witness: Yes. This is a blank form which was filled out just prior to my reading it to the group assembled at the terminal.

The Court: You may testify from it if you like.

Mr. Simon: If Your Honor please, I respectfully represent that a witness is required to testify from memory without the aid of notes unless it can be established that his memory is faulty. If he is going to read a document the document should be in evidence for the benefit of the Court.

The Court: If the witness made notes prior to an act and used those notes in the course of this act and retains those notes for the purpose of perfection and brevity he is allowed to read it into the record as a part of the testimony.

Go ahead.

A. The proclamation that I read is as follows: "My name is James Messer, Jr. I am City Attorney and a special police officer of the City of Tallahassee. I am advised that [fol. 38] your assembly here will tend to create a disturb-

ance or incite a riot or disorderly conduct within the City of Tallahassee," and at that point I added, "at the Municipal Airport of the City of Tallahassee."

Then I also added that pursuant to an act of the legislature we had police jurisdiction over the property owned and operated by the City of Tallahassee even though located outside of its corporate limits. I also mentioned the incidents which the defendants were familiar with which occurred the night before and that we had good reason to believe that even a more substantial number of persons were present at the airport that night.

Then I continued: "Therefore, as a special police officer of the City of Tallahassee and in the name of the State of Florida and the City of Tallahassee I command all of you who are here assembled immediately and peaceably to disperse." I there added, "And that means from the airport property of the City of Tallahassee." I continued: "If you do not immediately and peaceably disperse I shall cause you to be arrested for unlawful assembly."

Q. Did the Reverend Collier you were speaking to as spokesman for these defendants and all of them, did he hear what you said and did he attend and did he respond?

A. I might state that I gave—I concluded by saying, "I will give you 15 seconds to disperse."

[fol. 39] Reverend Collier who was standing said, "But we are interstate passengers." I replied to him in the presence of all of the defendants, possibly with the exception of Poland and Hunter and Priscilla Stephens, that "I did not consider you a bona fide interstate passenger. You made and cancelled at least three airline reservations."

Actually I waited until about a minute, between a minute and a quarter and a minute and a half, and then turned to the Chief of Police who was standing on my right and remarked to him, I said, "Chief, you can carry out your orders."

Q. During the time that you were discussing with the spokesman that you didn't consider them to be interstate passengers and the conversation between you did they have time to respond to your request?

A. Yes. There was some—for instance, there was a person in the audience there, Dan Speed, when I got about

two-thirds through with the proclamation he headed for the door and there were two young boys, negro boys, following him.

Just as I finished the proclamation or maybe shortly afterwards he came back and said to the Chief of Police who was standing just to my right, he said, "Chief, I am trying to get out of this thing and get out of the building," and he said, "they got the door blocked." The Chief said or turned to one of the officers present and said, "Tell Offi- [fol. 40] cer Kelley—" I believe he was on the door—"to let Speed and his companions out."

Q. Did the Reverend Collier acknowledge your proclamation in any way?

A. Other than he saying that he was an interstate passenger and he started off to say that we had no right to order his removal from the airport. I replied to him, I said, "I don't intend to argue with you."

Q. Did he disperse or refuse to disperse?

A. He sat down and as I recall opened his newspaper and started reading from it.

Q. Did the other members of the group, the ones for whom he was the spokesman, did they respond to your proclamation?

A. I did not see—

Q. In short, did they leave?

A. No, they did not.

Let me clarify that: I did not see in the group arrested the defendant Jeff Poland. I don't know where he was, nor did I see Priscilla Stephens that was taken into custody inside of the terminal, the lobby of the airport terminal.

Q. You say they did disperse, those two?

A. I don't know. Frankly, I was reading and I did see Dan Speed disperse and the two rather young boys that were with him. I say "young boys"—they looked like they [fol. 41] were around 19 or 18.

Q. Did you then see Lieutenant Bennett place these defendants under arrest?

A. Yes. Lieutenant Bennett said, "You are all under arrest," and he immediately got up and some had baggage with them and some didn't and they were escorted out to the police cars outside of the terminal.

Mr. Hill: I have no further questions.

Mr. Simon: May I have about two minutes to confer with my associate?

The Court: The Court will take about a five minute recess.

(A short recess was taken.)

The Court: Call your next witness.

Mr. Simon: If Your Honor please, we reserve the right of cross examination.

The Court: Excuse me. I am sorry. I overlooked that. Go right ahead.

Cross examination.

By Mr. Simon:

Q. Mr. Messer, other than the reading of the proclamation which you have previously identified did you have any conversation with any of the 13 defendants?

A. Not prior to their arrest.

Q. Did you have any conversations at all during the [fol. 42] 15th and 16th of June with the representatives or personnel of the Federal Bureau of Investigation?

A. No, I did not.

Q. Did you during the same period have any conversations with any United States Marshals?

A. I did not.

Q. During the same period did you have any conversations with the Governor of the State of Florida or any representatives of his office?

A. Yes. I had two conversations by telephone with the Governor of the State of Florida on Friday, June 16th.

Q. Was that prior to the arrest?

A. That was prior to the arrests.

Q. What was the substance of that conversation?

A. I was in the—

Mr. Hill: I object to that. It is hearsay.

Mr. Messer: This is cross examination.

Mr. Hill: It is not cross examination. I didn't bring that

up on direct examination, any conversations with the Governor.

Mr. Simon: I propose the witness act as a witness and not to instruct you as to what objections to make to the questions.

The Court: If you have an objection, Mr. Simon, address [fol. 43] it to the Court. Mr. Hill has objected to a telephone conversation as being hearsay.

Is that your objection, Mr. Hill?

Mr. Hill: I will withdraw it.

Go ahead.

The Court: The objection is withdrawn. Proceed.

A. I was at a conference in the City Manager's Office along with other members of the City Commission and the Governor called me on the telephone and as he started the conversation he said, "Excuse me." He said, "The Attorney General of the United States is on another line and I will call you back."

The second time he called—do you want the substance of that conversation?

Q. Yes, sir.

A. This was at approximately—because I looked at my watch—approximately three or four minutes after 10:00.

Q. This is on Friday, June 16th?

A. This is on Friday, June 16th.

Q. In the morning?

A. In the morning.

He stated that he talked with the Attorney General and that the Attorney General had stated that during the next two hours he would endeavor to get in contact with the defendants and the leader of the group of the defendants at [fol. 44] the Municipal Airport and ask them to cease their activities in Tallahassee and to leave and he suggested that we withhold any action during that two hour period.

Q. Was that the end of the conversation?

A. I might add at that time Commissioner William Mayo came into the conference. He was not there when we first started. He verified the conversation that I had with the Governor, the fact that he was there when the Governor had talked to me and he talked with the Attorney General.

Whether he heard any conversation between the Governor and the Attorney General I don't know because it was then agreed—at least I was requested to be back by quarter of 12:00 in the morning, Friday, the 16th, in the City Manager's Office.

Q. You were requested by the City Manager?

A. The City Manager and the Mayor.

Q. At the time that you read your proclamation did you see the defendant Poland seated in the terminal at the airport?

A. As I recall Poland was standing but he was in the group. Now, that was the time that I went out into the lobby prior to reading the proclamation.

Q. Do you know whether or not the defendant Poland obeyed the statement you made to leave the terminal?

A. Frankly, Mr. Simon, I don't know. I did not see Poland when the officers placed those seated in the lobby [fol. 45] under arrest.

Q. So, then, you don't know whether he obeyed or disobeyed your statement?

A. No, I do not, frankly.

Q. With regard to the defendant Priscilla Stephens, do you know whether she obeyed your statement to her?

A. I did not see her taken into custody in the lobby.

Q. Then you don't know whether she even heard your statement?

A. I don't know whether she heard all of it or not.

Q. You don't know whether or not she obeyed or disobeyed it?

A. No. Frankly, when I finished reading I was looking at the paper and I don't know whether she left. I did see Dan Speed and these two boys take off and she may have done that and Poland may have done that, I just don't know.

I did see Priscilla Stephens outside in the entrance to the airport while the defendants were taken into custody or arrested and observed her activities out there.

Q. With regard to the defendant Charles A. Hunter, do you know whether he heard the proclamation that you read to the group?

A. I don't believe I can identify Hunter. If he is pres-

ent, if you will have him stand, I will see if I can identify [fol. 46] him.

Q. You don't know whether he obeyed or disobeyed your statement?

A. I don't know the names of these various defendants. I mean, I couldn't call them by name. I can identify those that were there and did not obey. Which one is Hunter here (indicating) I couldn't say.

Q. You stated that there were two hours in which the defendants were to be given time to cease their activities, is that correct?

A. No. I was advised by the Governor that the Attorney General had asked for two hours in which to contact the defendants or their leader. In other words, the request from the Governor was that no action be taken during that time.

Q. What activities of the defendants were mentioned?

A. Mentioned by the Governor?

Q. Yes, sir.

A. Their presence out at the Municipal Airport, making reservations and cancelling them and just sitting there.

Q. Did I understand you to say in your testimony, sir, that somebody wanted to leave the terminal and wasn't able to?

A. Dan Speed whom I have known for years who is seated over there (indicating) was present when I walked up to the group and started to read the proclamation or [fol. 47] order of dispersal and as I started reading it he left very hurriedly accompanied by two young boys, I would judge they were around 19 or something like that.

After I had finished the proclamation he came back to the Chief of Police who was standing about two or three feet to my right and said, "Chief, I tried to get out of the door and the officer won't let me out."

Q. Who said that?

A. Speed, Dan Speed.

The Chief immediately turned to another officer and said, "Ask Officer Kelley to let Dan Speed and his companions out."

Q. Was there a cordon thrown around the airport for the purpose of preventing people from leaving?

A. I think there was—the purpose was preventing people from entering as well as leaving. I didn't know they were going to prevent them from leaving but apparently the officer on duty did not immediately permit people to leave. I think the principal thing was to prevent persons from coming in there who had no business in there, I mean airport business.

Q. Do you know whether all of the facilities of the terminal were in operation on the 15th and 16th of June?

A. What facilities do you have reference to?

Q. All of them.

[fol. 48] A. Well, of course, there are a lot of facilities out there. There are radio communication facilities, restaurant facilities, rest rooms. I assume you have reference to the restaurant or cafe?

Q. I am not asking you to make any assumptions, Mr. Messer. I am interested in whether you know whether or not all of the facilities at the airport were in operation during these two days, the 15th and 16th of June.

A. You mean facilities open to the public?

Q. Yes.

A. The restaurant on the 15th and 16th during the time that I was there was closed. The ticket counters of the airlines appeared to be open. The car rental service was open. The rest rooms were open. The telephone booths were available and as far as I know the airlines were functioning normally in their customary operation.

Q. Were you present at a conversation in which the person in charge of the restaurant was instructed to close the restaurant?

A. No, I was not.

Q. Do you know who was?

A. No, I don't. I don't even know who the manager or the person in charge of the restaurant is.

Q. You did know that such a conference had taken place [fol. 49] though, did you not?

A. No. The only information I had was at the bus terminal station someone told me that a group was going to take the 3:25 plane, I believe it is an Eastern plane, to Atlanta for connections in New York.

The Court: The question was whether or not you knew about any order to close the restaurant facilities. Is that right?

Mr. Simon: I believe so, yes, sir.

The Court: Answer it.

A. I knew of no order being given, no.

Q. You were about to tell us that information concerning such an order had come to you at the bus terminal, is that correct?

A. No. There was no order—

Mr. Hill: Just a minute. I object at this time as being improper cross examination and I withdrew an objection just a little while ago for the benefit of Mr. Simon and now he is going far afield. If I am not mistaken he has issued a subpoena for someone in connection with the restaurant facilities who I assume he is interested in having testify.

I did not examine Mr. Messer on direct examination relative to any restaurant facilities. I merely interrogated him directly relative to the conduct of these people, the [fol. 50] police protection that had been afforded them while they were in our City, the manner in which he read his proclamation to them at the time he did, how the arrests were made and items of that nature.

All of this is beyond the realm of cross examination. If he wants to make Mr. Messer his own witness then I would not press it.

The Court: Objection is sustained on the basis or on the ground it is not proper cross examination, not brought out on direct and on the further grounds that any conversation he had about any such order would be hearsay and not quite proper.

Mr. Simon: Then at this time we will reserve the right to call Mr. Messer as an adverse witness as being one of the officers of the plaintiff.

The Court: You can call him as a witness. You will have to establish his adversity at the time.

Q. You stated, Mr. Witness, that you had a proclamation in your hand that you read to these Freedom Riders, is that correct?

A. Yes, that's correct.

Q. May I see it, please?

A. Let me explain that that is the entire statement that was read (handing document to Mr. Simon). There was other matters mentioned which I testified to.

Mr. Simon: May I ask the Court Reporter to have this identified as Defendants' Exhibit "1-A" for identification? [fol. 51] The Court: I don't know about introducing any document on cross examination.

Mr. Simon: I haven't introduced it. I want to have it marked for identification so that if we do offer it at the time of our case in chief it will be recognized as being the same document that was delivered to us.

The Court: All right, so admitted for purposes of identification.

(Proclamation referred to was marked Defendants' Exhibit "1-A" for identification.)

Q. Mr. Messer, is this one of a number of similar documents that were prepared?

A. Yes. Those were prepared some days prior to the arrival of the defendants in the City. As a matter of fact, they were prepared during the session of the legislature.

Q. That would be sometime during the month of May, 1961?

A. Yes.

The Court: Any further questions, Mr. Simon?

Mr. Simon: Just a moment, if Your Honor please.

We have no further questions.

The Court: Any redirect, Mr. Hill?

Mr. Hill: Yes.

[fol. 52] Redirect examination.

By Mr. Hill:

Q. Mr. Messer, you indicated in response to some of Mr. Simon's questions on cross examination that there was a door at which Dan Speed was not allowed out. How far was that door from where you were standing and talking to this group?

A. I would say about possibly 40, maybe 50 feet. It was one of the doors to the entrance to the airport.

Q. Did these defendants here (indicating) make any move to go towards that door to your knowledge other than what you already stated?

A. I cannot testify that Priscilla Stephens did not attempt to leave.

Q. I am asking you, the fact that you have testified that Dan Speed said that he couldn't get out of that door, was that door barred to these ten defendants that you have referred to excluding Poland, Stephens and Hunter?

A. Not that I know of because they sat down. They just remained seated and more or less turned their backs on me.

Q. Is your answer that that door did not exclude them from leaving?

A. If they had gotten up to leave they would have been permitted to leave.

Mr. Hill: I have no further questions.

[fol. 53] The Court: Call your next witness.

(Witness excused.)

Thereupon, Paul Cannedy, called as a witness by the plaintiff, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Hill:

Q. Mr. Cannedy, this air conditioner is making a little noise. We will all have to hear you. Speak loud.

Will you state your name for the record?

A. Paul Cannedy.

Q. How old are you?

A. 41.

Q. Do you live in Tallahassee, Leon County, Florida?

A. Yes, sir.

Q. What is your occupation?

A. Station manager, Eastern Airlines.

Q. Were you the station manager for the Eastern Airlines on the 15th and 16th days of June, 1961?

A. Yes, sir.

[fol. 54] Q. Where are you stationed?

A. Tallahassee Municipal Airport.

Q. Do you know whether or not you had a block of 18 reservations to leave on your Flight 268 to leave on June—

Mr. Simon: I object. He is leading the witness.

The Court: He asked him whether or not he knew.

Mr. Hill: I asked him did he have a block of tickets.

The Court: Answer the question yes or no.

A. Yes, sir, I knew it.

Q. You did have such a block of tickets?

A. Yes, sir.

Q. What happened to that block of seat reservations or tickets?

A. The reservations were held in good faith, booked by our New York office. The parties that held the reservations checked in at normal check-in time and just a few minutes before scheduled flight—

Q. On what date?

A. On the 15th, the afternoon of the 15th, Thursday afternoon.

A few minutes prior to flight departure eight of the gentlemen elected to ride and ten of the parties cancelled their reservations.

[fol. 55] Q. Could you tell us the names of the ten parties who cancelled?

A. Yes, sir. I think I have all of those here (indicating). Just a moment, please.

(After examining records) The gentlemen that cancelled are Brown, Collier, Dresner, Freedman, Hartmire—

Mr. Simon: Would you spell that, please?

The Witness: H-a-r-t-m-i-r-e. That is what is on the card.

Q. Could that be Hartmire or are you reading from somebody's notes?

A. I am reading from the teletyped copies as it was received from our printer. It says H-a-r-t-m-i-n-e. That is the way it came off the printer.

Q. What are the initials that precede that name?

A. M.

(Continuing) —Hardge, Roy—we had two parties of Smith, one had been previously cancelled as I recall from the record—Warner and Stone.

Q. Mr. Cannedy, are you reading all 18 of those reservations?

A. No. I am just reading the names of those that did not ride.

Mr. Hill: May I ask the Court Reporter to check those [fol. 56] or read those back to me, please, sir?

Q. That did not ride?

A. Yes, sir.

Mr. Hill: May I have that?

The Court: Yes, sir.

Read that back (addressing the Reporter).

(That portion of the record referred to was read back by the Reporter.)

Q. Mr. Cannedy, that is nine. Were there any other cancellations out of that 18? Did you read the name McKinney?

A. What?

Q. McKinney, M-c-K-i-n-n-e-y.

A. There was 17 on one reservation and another one to make it 18.

(After examining documents) No, sir, I don't see a McKinney in this reservation here. The reservations that we had booked originally by the New York office do not show a McKinney in the names.

Q. All right. You said eight rode and ten did not?

A. Yes, sir, eight rode and ten did not because we held a block booking of 18 reservations.

Mr. Hill: Just a moment, please, Your Honor (examining document).

Q. Mr. Cannedy, how soon before departure time of your [fol. 57] flight that you just referred to were those cancellations made?

A. It was some seven or eight minutes. It wasn't too long before scheduled departure.

Q. Was this time for you to notify any stand-bys?

A. We had some stand-bys which we were able to clear, yes, sir.

Q. Did those ten that you have referred to make further reservations on your airlines?

A. Yes, sir, they did.

Q. Which reservations and when were they?

A. Our records indicate that after departure of Flight 268 on Thursday, the 15th, these gentlemen requested space for Flight 954 on the morning of the 16th which was Friday, scheduled to depart Tallahassee at 8:30 a.m.

At the time that they made the request we were unable to confirm the group booking of ten and we assured them we would attempt to get the space cleared and at the same time we booked the same space for Flight 954 on the 17 which is Saturday morning as protection until we could get the space cleared for them on the flight they wanted on Saturday morning.

Q. When you say "one seven" is that airline language for the 17th?

A. Yes, sir.

[fol. 58] Q. What were the names of the passengers you booked for Flight 954 on Friday, the 16th and on the 17th?

A. Our records on a group booking of this kind, we generally as far as the records are concerned on a block booking to start with, the group as originally booked by New York was called the Alstock group and our reservations agents used the same name in our original booking for the block booking, Alstock group.

Q. Can you answer my question?

A. At a later time we changed the card then to show the names of the gentlemen that we actually had on the flight at a later time.

Q. That is 954 on the 16th?

A. 954 on the 16th and 954 on the 17th was requested on the afternoon of the 15th after the departure of Flight 268.

Q. When you say 954 you are referring to one of your flight numbers?

A. Yes, sir.

Q. Would you give me the names of those reservations, please, sir?

A. At 9:35—let me back up just a minute. At about 6:30 on the afternoon of the 15th we were able to confirm five of the original requests for ten and our agent Frizen contacted Mr. Freedman and advised him at that time that we [fol. 59] had five seats confirmed and he instructed Mr. Frizen at that time that they did not want the five seats unless they could clear all ten of them on the same flight.

We told him we felt sure that we could clear it a little bit later on if they could give us a little bit more time to work on it. At approximately 8:35 p.m. on the 15th we got the balance of the seats confirmed making a complete party of ten.

Q. Will you give me the names of those ten, please, sir?

A. Yes, sir. Our records indicate that we held at 8:35 p.m. on the 15th the reservations for M. Brown, J. Collier, I. Dresner, M. Freedman, W. Hartmine, R. Stone, A. Warner, L. Roy, A. Hardge, and A. Smith.

I might clarify one point here: That eight of this party had requested continuing space to New York, Hardge and Smith desiring to deplane in Washington but requesting space from Tallahassee to Atlanta all on the same flight preferring the same space together on a specific flight from Atlanta to New York which would stop in Washington where Hardge and Smith could deplane and the balance of the party proceed to New York.

Q. What happened to those reservations, Mr. Cannedy?

A. At 8:35 P.M. when we confirmed the space to Mr. Freedman we asked him if we could have the tickets for the group to be reissued because there was a fare differential [fol. 60] in the tickets from the space they had rebooked because their original reservations called for a tourist flight connection out of Atlanta and the flight on which they were rebooked was a first class fare flight which meant we had to collect an additional amount of money on each ticket.

We were instructed at that time that they did not want to give us their tickets at that time but would wait until the next morning.

Q. What was the date of the next morning?

A. The next morning would be the 16th.

The following morning on the 16th these reservations, all ten of them were cancelled at 0815.

Q. All right. Did you have time to notify stand-bys in that instance?

A. We had no stand-bys for that particular flight because everything had cleared up.

Q. Then on each of the flights that you have referred to this party of ten remained and you had available seating space and airlines in the air, is that correct?

A. Yes, sir. The flights on the morning of the 16th had space available for this party, yes, sir, out of Tallahassee.

Q. And the afternoon of the 15th?

A. On the afternoon of the 15th, yes, sir, space was available for this party.

[fol. 61] Q. I believe that you testified that you spoke to a spokesman named Freedman?

A. I did not converse with him. The counter agents handle most of the transactions and they did all the work.

Mr. Simon: Then I move to strike the testimony of the witness relating to his conversation with the defendant Freedman on the ground the same is hearsay.

The Court: Objection sustained.

Q. Did you see your agent discussing these reservations with any of this group?

A. Yes, sir, I did. I had occasions several times to see them discussing it across the counter at various times with various members of the group, yes, sir.

Q. In your position as station manager you were aware of what was taking place, that they were making these reservations?

A. Yes, sir, that is my responsibility.

Mr. Hill: No further questions.

Cross examination.

By Mr. Simon:

Q. Is your name Cannedy?

A. Yes, sir. C-a-n-n-e-d-y, Paul J.

Q. I understand your position is station manager here in Tallahassee?

A. Yes, sir.

Q. Where do you work?

[fol. 62] A. Tallahassee Municipal Airport, Eastern facilities.

Q. How long have you had this job?

A. I have been in Tallahassee since October, 1947. I have been station manager for Eastern in this City since June of 1948.

Q. Do you work at the Tallahassee terminal?

A. Yes, sir.

Q. Am I correct in assuming that the terminal at which you presently work is not the terminal at which you worked some months ago?

A. That's correct, yes, sir. We worked the old airport and moved this spring, that's correct.

Q. This is a new air terminal?

A. Yes, sir, that's correct.

Q. How long have you worked this new air terminal?

A. We moved in, I believe it was the 30th of March if I remember correctly. It was right in that particular period of 1961.

Q. How many days a week do you work?

A. I am scheduled to—as far as my time is concerned I am on duty 24 hours a day seven days a week. I am on duty whenever I am available. Normally I put in five to six eight to nine hour days' per week. That is my normal work schedule.

Q. This 40 to 50 hour work week is spent at the airline [fol. 63] terminal?

A. Yes, sir, in our facilities at the airport, yes, sir, that's correct.

Q. Are you familiar with the airline terminal?

A. Yes, sir.

Q. Can you, generally speaking, describe the airline terminal for the purposes of this record so that we would know what it looks like, what facilities are available for interstate passengers and so forth?

A. The terminal building itself, as you approach it from the City, faces east. As you enter the building from the east side of the terminal there are three entrances that can be used on the east side and one on the north end of the lobby space and as you enter these areas you approach either the Hertz or Avis car rental facilities and then the Eastern Airlines ticket counter facilities and then the National Airlines ticket facilities and then there is a blank counter space which was built in for future expansion.

When you enter the building that area is to the right off of the main lobby. The ticket lobby space is away from the main lobby space off to the right.

Q. At the present time there are just two airlines having space in this terminal?

A. That's correct, yes, sir.

[fol. 64] Q. That is Eastern Airlines and National Airlines?

A. That's correct.

Q. Both of these airlines are interstate carriers?

A. Yes, sir, that's correct. The main lobby then is directly ahead and to your left as you enter the main doors of the terminal building. There is considerable seating space in the main lobby area.

The dining room area is on beyond the left of that which is—it has a glass enclosure going into it.

Q. Did you say dining room area or areas?

A. Dining room areas. There is two dining room areas, two dining areas. The Savarin Restaurant area, the main dining room of the terminal, is on this area.

Q. You say the Savarin Restaurant is a glass enclosed area?

A. It controls the whole dining facilities, the whole terminal.

Q. What is the other area?

A. There is a small counter space off to the—as you go into the terminal and turn to your left it would be off to

your left. There is a small counter there that is set up for colored eating facilities.

Q. Is it so designated?

A. Yes, sir.

[fol. 65] Q. Go ahead.

A. As you enter the terminal building, on your left, before you proceed directly through the terminal to the loading finger you have telephone booths on your right as you turn left, then on your left you have your rest room facilities.

Q. How many rest room facilities are there?

A. Four. First is designated White Ladies, White Men; then as you turn around a little alcove—I don't remember the exact order but it is Colored Ladies and Colored Men on the other side.

Q. Did you also indicate that there were two waiting room areas?

A. There is, yes, sir.

Q. How are they located with regard to each other?

A. The main waiting room is as you enter directly to your left. Then the area designated as the colored waiting room is just off to the left of that as you turn to your left, it would be on your left again back by the small lunch counter.

Q. Are these facilities which you described utilized for and by the passengers of your company and National Airlines?

A. Yes, sir.

Q. Are all of these rest rooms and waiting rooms and eat facilities housed under one roof?

[fol. 66] A. Yes, sir.

Q. Would you say that they are an integral part of the air terminal itself?

A. Yes, sir.

Q. Is the ticket office opened 24 hours a day?

A. No, sir, the ticket office is not opened 24 hours a day. We maintain 24 hour coverage in our facilities but our ticket office closes at 11:45 or 11:30 p.m. after our last evening departure.

Our reservations office facilities close at that time. We maintain one man on duty in the Operations Department

basically for security reasons because we have an aircraft that remains overnight which originates for us as a flight here the next morning. To keep fire and insurance regulations valid we have to have an employee on duty around the clock.

Q. Are you open every day?

A. Seven days a week, 24 hours a day.

Q. Is the air terminal open every day?

A. Yes, sir.

Q. Are the rest room facilities available on a 24 hour basis?

A. As far as I know they are, yes, sir.

Q. Seven days a week?

A. Yes, sir.

[fol. 67] Q. How about the restaurant facilities for the interstate passengers?

A. It closes after the last departure of National's flight which is scheduled out about 11:30 at night. They close up after that time and open the next morning.

Q. At what time do they open?

A. I believe it is 7:30. I can't say for sure. I haven't paid too much attention to their opening and closing hours.

Q. Are they open every day?

A. Yes, sir, seven days a week.

Q. How about the lobby space, the waiting room space, is that available and open every day of the week?

A. Yes, sir, it is open.

Q. On the 15th and 16th days of June did you happen to be working at the terminal on those days?

A. Yes, sir.

Q. Did you notice whether or not the restaurant facilities were open or closed?

A. They were open part of the day and closed part of the day.

Q. On the 15th of June which part of the day were the restaurant facilities open and which part of the day were the restaurant facilities closed?

A. They were open in the morning as I recall and they [fol. 68] were closed about 1:00 p.m.

Q. Did they reopen?

A. On the 15th?

Q. On the 15th.
A. No, sir.
Q. Were they open on the 16th?
A. No, sir.
Q. The 16th was a Friday, was it not?
A. That's correct, a Friday.
Q. Did they open on the 17th?
A. I was out of the City on the 17th. I can't answer you.
Q. Were you at the terminal on the 18th of June?
A. No, sir. I was in the City of Tampa on the 18th.
Q. Were you at the terminal on the 19th of June?
A. Monday, yes, sir.
Q. Was the restaurant open on that date?
A. Yes, sir.
Q. Were you in the terminal on the 20th of June?
A. Yes, sir.
Q. Was the restaurant open on that date?
A. Part of the day, yes, sir.
Q. Which part of the day?
A. I think it closed about 3:00 p.m.
[fol. 69] Q. On the 21st day of June—

Mr. Hill: I object at this stage. We are getting into the areas over which the issues do not portend. The Complaints are framed around the dates of the 15th and 16th. Mr. Cannedy said he was out of the City on certain other dates. Mr. Simon is continuing on and I assume he is going to work his way up to the present.

I contend it is improper and was not brought out on direct examination relative to that. Mr. Cannedy was only directly examined relative to reservations in connection with his job as the Eastern Airlines representative. I do not know what Mr. Simon is seeking, if the Court please.

The Court: It is kind of obvious but don't you think you have carried it far enough past the 16th to establish the pattern you want to establish?

Mr. Simon: I think I have, yes, sir.

The Court: All right.

Q. Mr. Cannedy, prior to the 15th day of June wasn't it a fact that the restaurant was open every day from 7:30 in the morning until sometime late at night?

A. To the best of my knowledge, yes, sir.

Q. With regard to these ten people who cancelled their reservations, were they in possession of airline tickets on your airline?

[fol. 70] A. Yes, sir. It was my knowledge they had tickets for the flight at 3:25 on the afternoon of the 15th.

Q. That was carrying them from points in Florida to points out of Florida, was it not?

A. Yes, sir.

Q. To your knowledge did they ever cancel their tickets?

A. They did not cancel the tickets but when they cancelled their reservations the ticket was automatically cancelled for that particular flight.

Q. Yes, sir, but they were in possession to your knowledge at all times of tickets from points in Florida to points beyond the State of Florida, were they not?

A. To the best of my knowledge they were, yes, sir.

Q. The first flight upon which they were booked out to your knowledge was Flight 268 on Thursday, June 16th at 3:45 p.m., is that correct?

A. Thursday, June 15th.

Q. I accept the correction, Thursday, June 15th.

A. 3:25, that's correct. Those reservations were booked originally by our New York office on June 9th according to the records that we have here (indicating).

Q. They were booked on a tourist flight, were they not?

[fol. 72] A. Booked first class Tallahassee, Atlanta as we have no tourist service through this City and they were connecting to a tourist section of a flight from Atlanta to New York, yes, sir.

Q. The other arrangements that were made for them were first class flights from Tallahassee to the final destination?

A. That's correct.

Q. You were not able to afford them equivalent flight service both first class and tourist as they had on other flights, were you?

A. Not at the time of the day they were requesting it. At that time, no, sir.

Q. Were you in a position during the 15th and 16th days of June to observe the conduct of the defendants?

A. Yes, sir.

Q. Can you describe how they acted?

A. We have no complaint with their actions and contact with our people. They were very polite and very co-operative asking for what they wanted and how they wanted it.

* * * * * * *

[fol. 79] Thereupon, RAYMOND J. LEWIS, called as a witness by the plaintiff, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Hill:

Q. State your name for the record, please, sir.

A. Raymond J. Lewis.

Q. Do you live in Tallahassee, Leon County, Florida?

A. Yes, sir.

Q. What is your business?

[fol. 80] A. Senior agent, National Airlines.

Q. Are you stationed in Tallahassee with National Airlines?

A. Yes, sir.

Q. How long have you been here as such agent?

A. Since 1948, September.

Q. How long have you worked for this airline or any other airline?

A. April of 1946, all with National.

Q. So you have been with the airlines some 15 or 16 years?

A. Yes, sir.

Q. Were you on duty with National Airlines on the 15th and 16th of June, 1961 in Tallahassee, Florida?

A. I was.

Q. Were you on duty at the Municipal Airport which is known as the Tallahassee Municipal Airport?

A. I was on duty.

Q. Is that the same airport at which Mr. Cannedy works and operates for Eastern, the gentleman who was just here testifying?

A. Yes, sir.

Q. On the 15th, Mr. Lewis, did you make a reservation for ten members or a ten member group to depart your Flight 362?

[fol. 81] A. Not on the 15th. I believe the correct date is the 16th.

Q. On the 16th? What day of the week was that? Was that Friday, Friday the 16th?

A. Friday the 16th, I believe that's correct.

Q. Do you know the names of those people who made those reservations?

A. I have my records with me.

Q. Would you tell us the names of those who reserved the flight on the 16th day of June, 1961?

A. The names I received were Dresner, Hardge, Smith, Hartmine, Roy, Stone, Collier, Brown, Werner and Freedman.

Q. Did you talk to your passenger Smith?

A. I do not know the passengers by name.

Q. Would you give us his initials if you have them?

A. I have no initials.

Q. You do not have initials for passenger Smith?

A. No.

Q. When were these reservations made, Mr. Lewis?

A. The record I have from National Airlines shows at 8:20 a.m. the morning of the 16th.

Q. Did these passengers hold tickets on your airlines?

A. They did not hold tickets on my airline.

Q. How did you then proceed to process these reserva-

[fol. 82] tions?

A. The passenger that contacted me was told that I would request the space, that it would probably be available and we would contact him or he could stop by in the next few minutes and contact us and was given until 12:00 noon on the 16th to—we would hold those reservations until 12:00 noon on the 16th for ticket reissuance and a definite confirmation on the reservation.

Q. Did you say "ticket reissuance"?
A. That's correct.
Q. What is ticket reissuance, Mr. Lewis?
A. When a passenger holds a ticket on another airline it has to be reissued for the airline on which he is traveling.
Q. In effect then, you swap the dollar value of the ticket and give the man a ticket on your line and he, then, uses your reservations and the ticket together to make the flight?
A. That's correct.
Q. What time was this flight to leave on the 16th?
A. It was scheduled to depart Tallahassee at 1:49 p.m.
Q. Were these reservations used?
A. No, they were not.
Q. What time were they cancelled?
A. Prior to 12:00 o'clock by several minutes.
[fol. 83] Q. Do you know the name of the spokesman that you were talking to?
A. I don't know his name but I would recognize him.
Q. Would you point him out to this group?
A. The gentleman sitting between these attorneys (indicating).

Mr. Simon: Let the record indicate that the witness identified Rabbi Freedman.

Q. The man you indicated, then, he was the one who cancelled as well as made the reservations?
A. That's correct.

Mr. Hill: I have no further questions.

Cross examination.

By Mr. Simon:

Q. Mr. Lewis, did you ultimately sell ten tickets to these ten people you just mentioned?
A. At a later date.
Q. What date was that?
A. It approximately could have been Saturday the 17th. I am not correct on that date. The best I can remember is the 17th, Saturday.

Q. You didn't bring these records with you?

A. No, I do not have those records with me.

Q. These ten tickets were from what point to what destination?

[fol. 84] A. From Tallahassee to New York City.

Mr. Simon: No further questions.

The Court: Any redirect?

Mr. Hill: No further questions.

The Court: May Mr. Lewis be excused from further attendance?

Mr. Simon: The defendants do not object, Your Honor.

Mr. Hill: That is all right.

The Court: You are excused from further attendance today. Thank you.

(Witness excused.)

Mr. Hill: May we have a minute or two recess? We have been going since about 9:00 o'clock.

The Court: All right. We will take one more five minute recess.

(A short recess was taken.)

The Court: Call your next witness.

Mr. Messer: If the Court please, counsel for the defense and Mr. Hill and myself representing the City conferred with the defendants Jack Poland and Hunter and we would like to move at this time to nol. pros. the cases pending against those two defendants.

The Court: That is John Jefferson Poland, Jr.?

[fol. 85] Mr. Messer: Yes, sir.

I might state for the information of the Court that they took the same action that Speed did except I believe that both of them got on the outside and possibly in the confusion they were apprehended by the officers.

The Court: All right, then the defendants Hunter and Poland, the cases are nol. pros. on motion of the City.

You are released from further custody and the charges and bonds are cancelled.

Mr. Hill: May we have them removed from the defendants' roll?

The Court: Yes.
Is the defendant Hunter in court?

(Defendant Hunter approached the bench.)

The Court: Did you understand the case is nol. pros. against you, there are no charges pending?
Defendant Hunter: Thank you, sir.
The Court: Call your next witness.

[fol. 86] Thereupon, FRANK STOUTAMIRE, called as a witness by the plaintiff, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Messer:

Q. Your name is Frank Stoutamire?
A. Yes, sir.
Q. Mr. Stoutamire, what official position, if any, do you occupy with the City of Tallahassee?
A. I am Chief of Police.
Q. How long have you served as Chief of Police of the City of Tallahassee?
A. Since September, '53.
Q. Were you present at the Tallahassee Municipal Airport on the evening of Thursday, June 15th?
A. I was.
Q. What time did you arrive at the Municipal Airport?
A. Possibly—I went out to the Municipal Airport on that day about 7:00 or 7:20 that morning. I made several trips out there during the day, some three or four trips out there during the day.

Mr. Simon: I cannot hear you.

A. I say I made several trips out there during the day from 7:00 o'clock to noon.
[fol. 87] Q. Mr. Stoutamire, I am referring to the night of Thursday, June 15th.
A. On the 15th?

Q. Yes, sir.

A. I went to the airbase or airport that afternoon about 3:00 o'clock.

Q. Who accompanied you?

A. You did.

Q. Did you remain at the airport until the airport was closed?

A. I did.

Q. Were there any persons or groups of persons coming onto the airport property in front of the airport terminal in automobiles?

A. There were.

Q. Do you know approximately how many?

A. I would not be able to say how many but there was a great many of them.

Q. Prior to the time that you became Chief of Police of the City of Tallahassee did you hold any position with the State of Florida or County of Leon as a law enforcement officer?

A. I served five years as Chief Deputy Sheriff of this County and I served 30 years as Sheriff of the County.

Q. You became Sheriff after being Chief Deputy?

[fol. 88] A. That's correct.

Q. Were the defendants here seated on this front row present in the air terminal building during the night of Thursday, June 15th?

A. They were.

Q. Did any persons come into the airport other than the defendants—

A. They did.

Q. (Continuing) —and excluding the law enforcement officers?

A. Yes, sir.

Q. Did you hear of any threats against the defendants by any of those persons who entered the airport building?

Mr. Simon: Objection on the ground it is hearsay, Your Honor.

Q. The defendants, I believe you stated, were present in the terminal building?

A. They were.

The Court: Objection is overruled then.

Mr. Simon: If Your Honor please, the building is a large building. I feel there may be some basis for considering the testimony of third persons if the statements are made in the presence of the defendants but there is no testimony as to that.

[fol. 89] The Court: I will hear you on that, Mr. Messer.

Mr. Messer: If the Court please, I am not asking the exact language that took place but the question was whether threats were made in the presence of the Chief of Police when the defendants were present in the lobby.

The Court: Not that they could hear but that they were there?

Mr. Messer: That they were there.

The Court: Why wouldn't that be hearsay?

Mr. Messer: I think it is part of the res gestae, that it is something that occurred in the immediate presence of the defendants.

I would like to inquire further of the witness whether or not they had an opportunity to hear it.

The Court: I think it would be admissible if they heard it. I know it would if they heard it or had an opportunity to hear it and I feel further it would be admissible if the purpose of such testimony is to establish circumstances that would tend to show the attitude, disposition or the safety or lack of safety for the visitors, the defendants.

Q. Were any statements made in your presence in the airport terminal building that caused apprehension on your part for the safety of the defendants?

Mr. Simon: Same objection, Your Honor, on the ground [fol. 90] of hearsay.

The Court: Overruled.

A. It was generally talked around the terminal that there was possibly going to be some violence if the defendants continued to stay there. I never or don't know that any one particular person told me they was going to do anything but it was generally talked around.

Q. Did you advise the defendants that the airport terminal would be closed down at approximately 11:45 p.m. on the night of June 15th?

A. I did.

Q. Did any of the defendants make any request of you in that connection?

A. J. W. Collier and Dan Speed both asked me if they would receive protection from the airbase to the City of Tallahassee.

Q. Did you tell them that they would receive that protection?

A. I told them that as far as the airport property was concerned, that I had jurisdiction there but that as I understood it I would not have jurisdiction from the airport property to the city limits but at the city limits I would have authority but that they would be protected.

They was led by one police car, one Highway Patrol car [fol. 91] and followed by a Highway Patrol car and two police cars to the City of Tallahassee and to their destination where they asked me to follow them to.

Q. When you say "Highway Patrol car" you are referring to patrol automobiles of the Department of Public Safety of the State of Florida?

A. That's right.

Q. The police cars which you referred to are police cars for the City of Tallahassee?

A. On arrival at their destination where they had asked us to take them, they asked us then if we would give them protection the next morning back to the airbase or airport. We told them that we would. One Highway Patrol car or one car belonging to the Department of Public Safety of the State and one police car followed them back to the airport. I was in the police car that followed them to the airbase.

Q. Mr. Stoutamire, the defendants had cars of their own or cars that were provided for them, is that correct?

A. I understood that they had local people's automobiles here who were taking them backwards and forward.

Q. From the requests you received from Dan Speed and Reverend J. W. Collier and from other persons other than the defendants and law enforcement officers who entered

the lobby of the terminal building and those persons who, [fol. 92] in automobiles, passed by the entrance to the terminal building, did you base on your experience as a law enforcement officer both as Sheriff of Leon County and Chief of Police have reasonable cause to believe that the continued presence of the defendants in the lobby of the airport terminal building might precipitate a riot or cause disorderly conduct?

Mr. Simon: Same objection, Your Honor. The witness is being called upon to give a conclusion.

The Court: Objection is overruled.

Mr. Simon: I would like to continue, if Your Honor please.

The Court: All right.

Mr. Simon: The conclusion is based upon hearsay; further, the question is irrelevant and immaterial unless it can be established that there was an unlawful assembly and there is nothing in the evidence or in the hypothetical question or in the question presented to this witness which indicates the existence of an unlawful assembly so even if there was an apprehension of riot his concern should be with the rioters and not the persons who were engaged in lawful assembly.

The Court: Mr. Simon, you know as well as I know that the law provides that a lawful assembly can become an unlawful assembly when certain things occur, when certain facts exist, and because of that law then his conclusion as [fol. 93] a reasonable, prudent person in the community and particularly with his vast experience make it a part of the res gestae and admissible.

The objection is overruled.

Q. Mr. Stoutamire, the question was rather long but, in effect, it was did you have reason to believe that the continued presence of the defendants at the airport building would tend to incite a riot, cause a disturbance and disorderly conduct?

Mr. Simon: Same objection based on the same grounds.

The Court: Overruled.

A. I did, based on the facts that on Thursday night, what happened there then, and what the defendants requested, that they be protected and that they had requested protection the following morning back to the airport and when I got there with the Freedom Riders they there asked if I would give them protection while they was there.

I told them that I had other matters to attend to, that I would not be able to stay there myself during the day but that I would leave police officers there for their protection and that I would be in touch with those police officers by telephone and by radio and if anything should exist, that those officers wanted me to come out there, that I would be available at any time.

I also told them that the Department of Public Safety [fol. 94] would have an automobile in that vicinity at all times for any protection that they might need.

I saw the next morning, which was on the 16th, after this instance I told you about, that I had taken them out to the base and they requested help—requested protection—I came back to town and made a trip or two out there during the morning and each time that I would make trips out there I would see cars and people in cars that I didn't see that they had anything at the airport to do unless it was for some unlawful purpose.

Mr. Messer: Your witness.

Cross examination.

By Mr. Simon:

Q. Chief, I believe that you stated that you went out to the airport on several occasions on the morning of Thursday, June 15th, the first one being at 7:00 o'clock and several times thereafter?

A. No. I thought he was talking about Friday. It seems he was speaking of Thursday. I went out there Thursday, not Thursday morning because they only arrived here about noon Thursday.

Q. Your testimony was inadvertently in error because you understood he was talking about Friday, not Thursday?

A. That's right.

Q. Can you tell us what was the first time or when was the first time that you went out to the airport?

[fol. 95] A. On Thursday?

Q. Yes, sir.

A. About 3:00 o'clock in the afternoon.

Q. Were these defendants already there?

A. They were.

Q. Did you attend a conference of any City officials or State officials with regard to the closing of the restaurant in the terminal?

A. I had nothing to do with the closing of the restaurant. I was in several meetings with some of the City Commissioners. I do not have anything to do with the closing of the restaurant.

Q. Do you know who arranged for the restaurant to be closed?

A. I do not know who made the arrangements with the restaurant operator.

Q. Do you know whether or not it was one of the City Commissioners or the City Manager?

A. Not that I personally know, no, I don't know. I was not with them when there was such a request made.

Q. You do know that such a request was made, however?

A. I understood there was but I don't know it.

Q. Your testimony was that you feel you have jurisdiction over the facilities at the airport, is that correct?

[fol. 96] A. That's right.

Q. To your knowledge, are there people stationed on duty at the airport all day and all night?

A. No, sir. I have a policeman that stays at the airport during the time that it is open. When it is closed we don't have a policeman there. They have a guard there when it closes.

I might say this: It is not in reference to a question but in many years as a law enforcement officer and seeing many instances where, in my judgment, they would be—there would possibly be a riot, it has always been my practice, it has always been my purpose to avoid it the best I could using my better judgment and my judgment has always been to move the cause and protect the cause and get them away from where I thought the violence might occur.

Q. Did you have the occasion to observe these defendants in the terminal on the times you took trips out to the terminal on Thursday and Friday?

A. I did.

Q. Would you describe what they were doing there?

A. They was sitting on seats in the waiting room.

Q. Was that the white waiting room?

A. It was. They was using the toilets and just around but as a usual thing they were sitting on seats.

[fol. 97] Q. Were they using the white toilets?

A. They were.

Q. What else were they doing?

A. Well, as I told you they was just in and around but mostly they had a regular headquarters in the waiting room.

Q. Do you know from your own knowledge whether or not these people had tickets to travel on an airliner?

A. Only that I was advised so.

Q. Do you know whether or not they were waiting to depart on an airplane?

A. It was my understanding that they had tickets to leave the airport on Friday. They cancelled, so I am told, that reservation.

Q. Were you told why they cancelled it?

A. I do not know.

Q. Do you know whether or not they had made a further reservation?

A. I understood they made reservations then for the following morning, some two or three reservations, and cancelled those.

Q. Do you know whether or not at the time of the arrest that they had a reservation to leave Tallahassee on an airplane?

A. As I understood it, they did not.

[fol. 98] Q. You don't know?

A. I don't handle the airbase. I don't handle tickets. I don't know about that.

Q. You stated that you were worried that if these people continued to stay in the airport there would be violence.

A. I came to that conclusion from the people that I saw there and things that I heard.

Q. Did you come to any conclusion as to why these particular ten people would cause other people to become violent?

A. Yes.

Q. What conclusion did you come to?

A. I came to that conclusion because of several things. I had read in the newspapers, I had heard on the radios of trouble that Freedom Riders had had in other cities and I felt that I was using that for a basis and people I seen in and around the airport and rumors that I would hear, that it was necessary that we take such steps to move the cause.

Q. You weren't concerned with whether or not these people were or were not passengers or interstate passengers on an airliner, were you?

A. I was under the understanding that they were there, had refused several reservations and that they was there creating a disturbance among the local citizens here.

I based my judgment on that and just what I would see [fol. 99] from the general public. I also thought that from what they had asked—when they asked for protection, I base that on that, too.

Q. Now, I understand from your testimony that it was the local citizens that you felt would become violent.

A. I saw citizens—I mean, I saw people both at the bus station and at the airbase that I didn't know who they was but mostly it was local citizens.

Q. Did you arrest any of them?

A. I did not.

Q. Did you arrest any of these people that you testified were milling around the air terminal?

A. I did not.

Q. Did you order them to disperse?

A. We did at the bus station. We did not—at least that was my instructions for them to do that at the bus station.

Q. Was there any violence at the bus station?

A. I am told that there were not but I was not there. I took my time surrounding the bus station in an automobile just to keep my eye on what was existing and whether there was danger or whether there was not so I would have first hand information about it.

Q. How many police are there working in the City of Tallahassee?

[fol. 100] A. I have a personnel of 75.

Q. What is the population of the City of Tallahassee?

A. A little less than 50,000.

Q. Did the Governor of this State put State Troopers at your disposal or have them available for working with you for the protection of these people?

A. I don't remember what the Governor did but I do know the State Troopers was with me.

Q. Were they acting under your command or independently of your command?

A. I might say this: That when we begin to get the publicity and hear the publicity that the Freedom Riders was coming here, in order to protect—both the Department of Public Safety and my Assistant Chief and the Captain of the Detectives Department and the Sheriff's Office of Leon County all had a meeting to determine what protection we was going to give them and it was agreed that we would all give them protection, we did not want incidents to happen in the City of Tallahassee and in the County of Leon that had happened in other towns.

Q. You therefore did make protection available to these people from any abuses or excesses by the local citizens?

A. We did and in speaking to John W. Collier after the arrest the following day he told me that—that the Police Department has certainly been nice to him and that he ap-

[fol. 101] preciated the protection that we had given them.

Q. The defendants themselves, these Freedom Riders you mentioned, you did not see them actually creating a disturbance themselves, did you?

A. I did not.

Q. I am sorry?

A. I did not.

Q. How long have you lived here in Tallahassee?

A. I was born and raised in this County.

Q. Then I won't ask you how long ago that was.

A. I don't mind telling that either. I am 70 years old.

Q. That is wonderful.

Mr. Stoutamire, can you from your experience as a public officer and as an individual who has studied people in this

area for 70 years tell us what there was in the fact that these ten people were sitting in the municipal terminal in Tallahassee that would cause people in this County and in this City to become upset and riotous and to act in an illegal and unlawful manner?

A. As I stated before the publicity that had been in the newspapers and on radios prior to them coming to Tallahassee about what had happened in other towns, the newspapers and radios that was giving the information that they [fol. 102] would be here at a certain time, people in my opinion in the City and in the County was somewhat enraged about the fact that they were coming. Therefore, for that reason I felt that it was necessary to give them proper protection because I did not want to have any instances in this City that had happened in other cities.

Mr. Simon: We have no further questions.

Redirect examination.

By Mr. Messer:

Q. Mr. Stoutamire, just to clear the record on one matter, I believe you went out to the airport the first time around 3:30 on June 15th. That was the time I accompanied you, is that correct?

A. That was the time I went—yes.

Q. Then the times you were there, several times during the morning, and, of course, you were there that night, that evening as you testified—

A. That's right.

Q. (Continuing) —then were you in the group that escorted them, the defendants, to the airport that morning?

A. I was.

Q. Mr. Stoutamire, did you have any reason or information to the effect that on the night of Friday, June 16th that there would be a very substantial group of people coming to the airport from places other than the City of Tallahassee?

Mr. Simon: I object on the grounds it is not proper re- [fol. 103] direct; it is leading and necessarily based on hearsay and a conclusion of the witness.

The Court: Objection sustained on the basis that it is not proper redirect.

Q. Did you have any reason to believe that if the defendants had been permitted to remain at the airport terminal subsequent to their arrest and I am referring particularly to the night hours that there might have been some violence?

Mr. Simon: Same objection and a further objection that this is beyond the scope of the charges that are involved here because it is referring to a time that took place beyond the hours of the arrest and it is clearly not within the scope of redirect examination.

The Court: Objection sustained.

Mr. Messer: Let me make this one point and I do it very respectfully: It is like a police officer taking a gun away from a man and somebody contending that he ought to have waited until he let the man shoot somebody with the gun.

The point I am making is that I think it is proper as part of his opinion that their presence there constituted a menace or might tend to incite a riot.

The Court: I understand the purpose of it but you explored that on direct examination and on redirect I don't think it would be proper to explore it further. For that [fol. 104] reason the objection is sustained.

Mr. Messer: I have no further questions.

Mr. Simon: Could I ask the Court to inquire of Chief Stoutamire if the witness subpoena that we have asked the police to serve has been taken care of?

The Court: Do you know yet about that?

The Witness: Maybe I can find out.

(Discussion off the record.)

Mr. Simon: Would Your Honor ask him to do that and report back to the Court?

The Court: We will do that.

Is there any reason why the Chief can't be excused from further attendance?

Mr. Simon: No, sir.

The Court: All right.

(Witness excused.)

The Court: Call your next witness.

[fol. 105] Thereupon, JAMES F. BENNETT, called as a witness by the plaintiff, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Hill:

Q. Will you state your name for the record, please?
A. James Bennett.
Q. Are you also known as Billy Bennett?
A. Yes, sir.
Q. What is your occupation?
A. Lieutenant with the Police Department.
Q. City of Tallahassee Police Department?
A. Yes, sir.
Q. How long have you been a police officer?
A. Approximately 20 years.
Q. Was most of those 20 years in the City of Tallahassee, Florida?
A. Yes, sir.
Q. Were you on duty on the 15th and 16th days of June, 1961, Mr. Bennett?
A. I was.
Q. Will you tell us what your duties were or your assignments were on those dates?
[fol. 106] A. On Thursday the 15th around noon or a little before I was assigned or given an assignment in and around the Greyhound bus station to keep law and order and to give protection to those who might need it.
Q. Were you given specific instructions with respect to any definite group of people?
A. I was. I was instructed that there was a number of 18 Freedom Riders coming into the City by Greyhound bus arriving about 12:30 or 12:35 noon that day.
Q. In addition to those duties were you ever assigned to the Tallahassee Municipal Airport?
A. I was. I had an assignment at that same time that the information was that that special group was going to the airport and at about 1:30 I did go to the airport.
Q. What did you do and observe out there, Lieutenant Bennett?

A. I arrived there before any of this group which I had seen and recognized at sight and they came out there and entered the airport, gathered immediately in front of the ticket counter and they went in a huddle there and they would talk with the ticket agent, then they would go in a huddle themselves and talk to one another. First one would talk and then the other one and they would hold up their hands as if they were voting on some decision.

[fol. 107] They were milling—

Mr. Simon: I object and move to strike the conclusion of the witness.

The Court: The conclusion that they appeared to be voting on something?

Mr. Simon: If he saw them raise their hands—

The Court: He said as though you would vote on something. It is just a figure of speech.

Objection overruled.

A. They were milling around the airport, to the telephone, back into a huddle, talking to the ticket agent continuously time after time. Then, two and three at a time they would move from one position in the air terminal to another.

Q. What time was this?

A. This was after 1:30; from 1:30 until 5:00 I observed them in the airport building.

Q. Were you present at the time Eastern's 3:25 p.m. airplane departed?

A. I was.

Q. Did you see any of the group that you have just referred to leave on that plane?

A. Yes, sir. Eight out of this group left on that plane.

Q. Did you count them?

[fol. 108] A. Yes, sir, I did.

Q. Do you remember how many remained?

A. There were ten.

Q. What did they do then?

A. They came back in and took a seat in the lobby. Most of them were carrying baggage and they sat down close together and took a seat in a close huddle right in about the center of the lobby of the airport.

Q. If I am not mistaken your testimony is referring to the 15th day of June, that is Thursday?

A. Yes, sir.

Q. How long did you stay at the airport?

A. I stayed until 5:00 o'clock, 5:00 p.m. that afternoon.

Q. Did you have any other duties at the airport that day?

A. I did not.

Q. Did you ever go back to the airport that day or any subsequent day?

A. I was assigned—on the 16th, Friday morning, I was advised that this group was going back to the airport and I was assigned to see that they had protection from Tallahassee to the airport and while at the airport.

Q. Were you with anybody?

[fol. 109] A. I was riding in the car with Chief Stoutamire.

Q. Did you go to the airport?

A. We did. At approximately 7:00 o'clock we followed this group which were traveling in either four or five cars out to the airport.

Q. Did you speak to any members of the group at the time?

A. At arrival at the airport Chief Stoutamire stepped out of the car and talked to Dan Speed.

Q. Why did he talk to Dan Speed or do you know that?

A. Yes, sir, I heard the conversation. The Chief told Dan—

Mr. Simon: Just a moment. We object. This is not a conversation between any of the parties to this cause. Speed is not a defendant.

The Court: If the conversation was not overheard by the defendants it will be hearsay and not admissible.

Q. Lieutenant, did Dan Speed approach Chief Stoutamire in connection with the matter that they discussed or did the Chief call Dan Speed to him or do you know?

A. At that time he was approached by Dan Speed.

Q. He was approached by Dan Speed?

A. Yes, sir.

Q. Do you know Dan Speed?

[fol. 110] A. Yes, sir, I do.

Q. Did you see him in connection with this group at any time on the 15th and 16th?

A. Yes, sir. Off and on all during the day most times.

Q. Did he appear to be a part of them or acting in concert with them in any way?

A. He appeared to be part of them.

Mr. Simon: I object on the grounds it calls for a conclusion and it is immaterial and irrelevant. There is no charge against Dan Speed for acting in concert or in conspiracy.

Mr. Hill: Before you rule on that, Your Honor, I am attempting and will show this by its materiality that Dan Speed, by his conduct, was associated with this group in some way and at that time purported to act as a spokesman for them and, if so, then any statements made to him are relevant and material to this cause.

His name has been brought continuously into this record.

Mr. Simon: Not by us and I move to strike all references to his name.

Mr. Hill: It is a little late to make a motion to strike.

Mr. Simon: Regardless of whether he has been named he hasn't been made a party to this cause. No charges for [fol. 111] him are outstanding.

The Court: What was the question?

Mr. Hill: I will have to ask the Court Reporter to read that back.

(The question referred to was read back by the Reporter.)

Mr. Hill: Before you rule may I ask this witness one more question?

The Court: All right.

Q. You say you followed this group to the airport at about 7:00 o'clock on the morning of the 16th?

A. Yes, sir.

Q. Was Dan Speed driving one of the cars that was part of this group?

A. I'm not sure.

Q. Was he with part of the group?

A. I did not recognize Dan Speed until I saw him out of the car and on the ground at the airport right in front of the entrance to the airport.

Q. Did you see him with this group at the bus station the day before?

A. I did, sir.

Mr. Hill: Now, Your Honor, would the Court like to rule on the objection?

[fol. 112] Mr. Simon: All that shows is he may or may not have been a chauffeur. This doesn't mean he is an interstate passenger.

The Court: The question now before the Court is whether or not he appeared to be a part of the group or a member of the group and the objection was it calls for a conclusion of this witness.

I am going to sustain the objection.

Q. Did you see or were you present at the time that Chief Stoutamire talked to a member of this group?

A. I was.

Q. Who was he?

A. I would say at least an hour or an hour and a half after arriving and talking to Dan Speed, inside of the terminal after the flight that we had information that this group was to leave on did not go, Chief Stoutamire contacted the group for a spokesman of the group. One of the members named Collier stood up and said he was and the Chief told him he had protected them, given them protection—

Mr. Simon: I object on the grounds these are self-serving declarations. Chief Stoutamire is here, he can testify as to what he said.

It is hearsay and it is also repetitious.

The Court: Objection overruled.

[fol. 113] Q. Proceed.

A. The Chief told Collier that he had been with them for more than—from noon the day before until about approximately midnight that night and had been out that morning, followed them out that morning and he had other duties to perform in the City and that he was going back to town but that he was going to leave two officers out at the air-

port to observe and see what was going on and to keep law and order, but in that conversation Collier asked him if he was going to give them protection. The Chief told him he was going to leave the two officers out there.

Q. Did I understand you to say that one of the airline planes departed while you were there?

A. Yes, sir.

Q. Do you know which airline it was?

A. We had information it was to leave at 8:38 and believed to be Eastern Airlines.

Q. Did you see that plane leave?

A. I did.

Q. The defendants obviously did not get on it?

A. No, sir. I was on the inside of the building but I could see very easily the plane depart from the inside.

Q. Did you stay there all day or did you leave?

A. Shortly after that plane left which was 8:35 I came back to town.

[fol. 114] Q. Did you ever go back to the airport?

A. I did. About noon information was received through the Police Department and by myself and the Department decided to go out to the airport so about noon or about 12:30 Chief Stoutamire went back to the airport.

He and Mr. Messer were talking in the air terminal. Shortly after that at approximately 12:35 we made the arrest of the defendants who are here today.

Q. Were you standing there at the time he was reading this proclamation?

A. I was an arm's length away from him.

Q. Did he tell them who he was?

A. Yes, sir. Mr. Messer read from this piece of paper or proclamation and told them who he was and told them his name and who he was, that they were unlawfully assembled and asked them to disperse.

Q. How many did disperse, if any?

A. There was 13 in the group and three of them immediately dispersed as ordered by Mr. Messer.

The rest of them shuffled around just a little bit. While he was reading this proclamation they all gathered in a close huddle so they could hear. Immediately after he told them—after he finished reading it he told them he would

give them 15 seconds to disperse. They shuffled around and [fol. 115] moved around. Some of them came up nearer and sat down and some backed off. In general, it was a general shuffling of the group at that time.

Mr. Messer checked the time and longer than 15 seconds, I am sure—I would say it appeared to be a minute or two minutes—he said the time was up and ordered that all of them was arrested, arrested the group.

Q. Did they have time to comply or obey?

A. Yes, sir. They had ample time, more than time to have left the building and the premises which they were ordered to, in that length of time.

Q. All who elected to disperse did so, is that correct?

A. Yes, sir. Dan Speed was in the group. He and two boys immediately left the building and I didn't see them any more.

Q. Did you make the actual arrest of these ten people?

A. I did along with Chief Stoutamire and Mr. Messer. There was other officers in the building and they were taken into custody by, I would say, six or eight police officers.

Q. Were you present at the arrest of one Priscilla Stephens?

A. I was.

Q. Would you describe what happened there, please?

A. At the time the group was arrested they all went out of the building in a group with, I would say, six or eight [fol. 116] police officers.

I was standing near the back of the group so I followed them out and came out the door about the last one. When I got outside the officers had the police cars lined up in front of the door.

Priscilla was just ahead of the group and had not gotten in a car so she was standing right near a car. I walked up to her and asked her to get in the car. She told me she was not getting in. I opened the door and asked her to get in the car again. She started to walk away so I opened the door and took her by the arm and led her back up to the car with the door open and asked her to get in. She told me she was not getting in so I held her to keep her from either walking or running away and with the assistance of Officer Daws put her in the car.

Q. Did she make any overt act to resist you or oppose you other than what you testified to?

A. No, sir, just an attempt to walk away.

At the car, we had to use just manual force to get her in the car.

Q. What do you mean by "manual force"?

A. Had to hold her right near the seat where she could get in. She didn't make any effort at all to get in herself. She just stood with her body real stiff up against the car.

She finally sat down from outside with her feet out and [fol. 117] would not put her feet in as she was told. We had to lift her feet up and sit them around in the car.

Q. Did you notice at any time over the period that you have testified to that you were present at the airport any large crowds of people there?

A. There was. On Thursday people were gathered and were screened at the driveway to the airport by police officers.

As I left there was a group that gathered up right at the entrance that were not allowed to enter the airport terminal or the grounds.

Q. As a police officer of some 20 years experience, Mr. Bennett, did you have any feeling that there would be a breach of the peace at this time?

A. Yes, sir. I felt that without the police protection that there surely would be.

Mr. Dixon: Excuse me, Mr. Hill. What time was this, Thursday or Friday?

Q. Thursday or Friday?

A. I was describing the incident Thursday about 5:00 o'clock when I left the airport but Friday the same thing or worse—a bigger crowd had gathered on Friday. There was a bigger crowd on the grounds of the terminal and inside the building because Thursday they were screened at the driveway, at the entrance to the air terminal.

[fol. 118] Mr. Hill: You may cross examine.

Cross examination.

By Mr. Simon:

Q. Officer, where was Priscilla Stephens at the time that Mr. Messer read this proclamation?

A. She was in the group that was assembled inside the bus station.

Q. Did you see her leave?

A. I did not. The group was pretty large with the spectators and the police officers and I did not pick her out of the group as walking out but the group went out together and she was in the group.

Q. It was your testimony that she was ahead of the group?

A. I did not see her go outside. I don't believe that I said she was ahead. I don't know exactly who was ahead.

Q. When you got outside I believe your testimony was that she was already out there.

A. She was.

Q. Were you with the group or behind the group?

A. I was behind the group, just right one step behind the group as it went out the door.

Q. Then you don't know whether or not Priscilla Stephens left in obedience to Mr. Messer's suggestion or not?

A. I know she did not.

[fol. 119] Q. How do you know that?

A. Because she did not immediately leave the bus terminal—the airport terminal. The only three that immediately left was Dan Speed and two other boys and the group went out together. That is the only three that left immediately. Then there was considerable time, one or two minutes or more elapsed.

Q. Was it your testimony that you don't know whether John Poland left?

A. He did not leave immediately after Mr. Messer had ordered them to; within the period of time he gave them, neither one of them did leave.

Q. Neither one of who?

A. Poland or Stephens.

Q. But they did leave before the arrests were made?

A. They did not.

Q. It is your testimony that they were taken into custody in the terminal?

A. I carried Poland out of the building myself but the group went out ahead of me. What time he went out or where he went out—I carried Poland out of the building myself.

Q. He was behind the group then?

A. No, sir.

Q. You told me you were just walking behind the group.

[fol. 120] A. He had stopped. When I got a hold of him he was standing still about half way from where the group was seated and the front door.

Q. Then he left the group?

A. He was standing still but he wasn't out of the group because I was right at the back of the group.

Q. Do you mean he wasn't out of the terminal but he left the group?

A. No, sir, he hadn't left the group. When I got to him he was standing still and I just continued to carry him in the group so he didn't get out of the group. The group didn't leave him.

Q. The group caught up to him—

A. That's possible.

Q. (Continuing) —is that correct?

A. That's possible. I didn't see him when he stopped.

Q. It is possible that the group could have caught up to Priscilla Stephens outside of the terminal, too?

A. I am sure she did. She got out before I did and there was—we had the group put in cars and there were several put in the police cars or voluntarily went and got in themselves before she got in.

Q. Do you know Charles A. Hunter?

A. I do.

[fol. 121] Q. Did you see him leave?

A. He left in the group.

This group was so large, out of the 13 that we arrested and the police officers and the spectators until I couldn't keep my eye on any particular one. My main thought was to keep the group together as it went outside and see that they got transportation from the airport back to the city limits so I did not keep my eye on anyone from the time they were arrested until they got in the car.

Q. When you say "spectators" do you mean people in the terminal who had no business being there—

A. That's right.

Q. (Continuing) —is that correct?

A. That's right.

Q. How did you know they didn't have any business being there?

A. I didn't stop and ask them but from the group that was there they were not there for the purpose of catching a plane or getting out.

Q. That is what you surmised?

A. That's right.

Q. Did you ask any of them to leave the terminal?

A. Right at that time I did not.

Q. At any time?

[fol. 122] A. The day before, Friday, we had.

Q. The arrest was made on Friday, Officer.

A. I mean Thursday I had. At the time the arrest was made, I was only at the airport a few minutes before the arrest was made at that particular time.

Q. You were there in the morning you said.

A. Yes, sir.

Q. Were there any spectators there at that time?

A. Very few. That was—I left there soon after 8:30.

Q. Well, then, it would be your testimony that the police did not stop people who had no business at the terminal from coming onto the terminal property during the Friday morning?

A. I don't believe they did, sir.

Q. I'm sorry?

A. They did not.

Q. The police made no effort to ask these people to disperse either, did they?

A. There was two police left at the terminal but from the time that I went back out there Friday morning until I made the arrest I did not ask any of them to leave.

Q. None of the other police officers did either?

A. I don't know.

Q. As a matter of fact, at the time the arrest was made there were a large number of police officers there?

[fol. 123] A. Not a large number. There was at least six or eight.

Q. To your knowledge did any of these people ask any of the spectators to leave or disperse?

A. The two that was left out there was to observe and keep order out there and when the group went out there, when they went out there for the purpose of removing this group that was causing the trouble, that we thought would cause the trouble if we didn't do something about it—

Q. Which group caused the trouble, Officer?

A. The group that was caught—we received the most talk about and what was probably causing the trouble was the group we arrested.

Q. Do you know whether they had any airline tickets?

A. I am sure they did but I did not see them buy them or see the tickets but I am sure that they did.

Q. Can you tell me why you think they were causing trouble?

A. Their being there was the talk about town and the groups that were gathered there were talking about them and there was considerable resentment among the people.

Q. Aren't there usually people with airplane tickets at the airport terminal?

A. I am sure there are.

[fol. 124] Q. Why were these people causing trouble?

A. The fact that these people were there and the people —the publicity they got about this group that was coming to town. I don't know what caused the resentment or the groups to gather.

Q. It was the resentment that was causing the trouble, wasn't it?

A. I don't know exactly what was causing the trouble but it was the groups that were beginning to gather and there was certain talk and rumors there might be trouble if we didn't do something about it.

Q. Did you explore these rumors and this talk?

A. We did.

Q. Did you arrest any of the people who were making threats?

A. Not Friday but Thursday there was several of them questioned about it.

Q. Were there any arrests made?

A. Not to my knowledge.

Q. There weren't any arrests on Friday made of anybody that made any threats, were there?

A. I beg your pardon?

Mr. Simon: Read the question back (addressing the Reporter).

[fol. 125] (The question referred to was read back by the Reporter.)

A. There was not, to my knowledge.

Q. Did you hear any of these defendants make any threats?

A. I did not.

Q. Can you tell me in what manner they were making trouble?

A. From the Thursday that they arrived, that I received information they had arrived, we planned to give them protection and keep law and order in the City. From that moment on the crowds began to gather as though there might be trouble. The talk among the people was that there might be trouble so we were just being sure.

Q. From whom did you expect the trouble, Officer?

A. From out of this group and the people that were gathering.

Q. From the ten people?

A. Yes, sir—

Q. What kind of trouble did you expect from them?

A. (Continuing) —and their followers.

Q. What kind of trouble did you expect from these ten people?

A. We wasn't—we didn't expect any certain kind but [fol. 126] we expected there might be trouble out of them, disorderly conduct and a riot or whatever might arise.

Q. Caused by them?

A. Caused by them and their followers and the other groups that were gathering.

Q. Do you mean the spectators?

A. Yes.

Q. (Continuing) —the people that had no business in the first place, is that correct?

A. That's right.

Q. You have been a police officer in this County for about 20 years?

A. Yes, sir, approximately.

Q. Do you know of anything unusual about these ten people that would have caused resentment against them by the townspeople in this community?

A. I am not sure of what caused it but it did cause it.

Q. You don't have any idea at all?

A. No, sir.

Q. Officer, your statement is after living in this community and working as a police officer for 20 years you don't have any idea why these ten people sitting in an airport terminal should cause trouble in this community, do you?

A. I got my own ideas about what happened but I am [fol. 127] not sure what theirs were.

Q. I am asking you for your ideas, Officer.

The Court: Mr. Simon, you are on cross examination and you can lead the witness a great deal and even suggest if you like, if you were trying to get one particular answer. If you would ask him and save 30 minutes of beating around the bush the Court would appreciate it.

Mr. Simon: If I had an idea I would be pleased to help him but I assure you I do not.

The Court: You don't have any idea at all yourself?

Mr. Simon: No, sir. I don't live in this community.

The Court: Well, go ahead.

Q. Can you answer the question?

A. Give it again, please.

Q. What is your idea as to what was causing this difficulty?

A. I haven't got any idea what they thought about it, other people thought.

Mr. Simon: All right. No further questions.

Redirect examination.

By Mr. Hill:

Q. Lieutenant Bennett, could it be because of the advanced publicity and the manner in which these people [fol. 128] came to our town?

A. That is what led me to believe that there would be trouble. It is possible that is what led the rest of the people.

Mr. Dixon: I move that be stricken as completely leading and suggestive.

The Court: And repetitious. He already testified that that would have a large bearing on it.

Objection sustained.

Q. Did all of the people who could have possibly caused trouble, were they dispersed by you or by any other police officers?

A. They were.

Q. This is the only group that refused to disperse upon order by a police officer?

A. That's right.

Mr. Hill: No further questions.

Recross examination.

By Mr. Simon:

Q. Did you hear Mr. Messer read this statement to these ten people?

A. I did.

Q. Did you hear him read it to the other spectators standing there?

A. There was more than ten; there was about 16 in the [fol. 129] group that he read it to.

Q. Did you hear him read it to the other spectators?

A. No, sir, I did not.

Q. They still stayed there, didn't they?

A. Not after the arrest of this group they did not.

Q. They dispersed by themselves after this group was arrested?

A. Yes, sir.

Mr. Simon: That is all.

Mr. Hill: I have no further questions at this time.

The Court: Any reason why the Lieutenant can't be excused to go back to his duties?

Mr. Simon: No, sir.

(Witness excused.)

The Court: Do your people intend to testify?

Mr. Simon: Yes, sir.

The Court: At great length?

Mr. Simon: Well, I think that the way we have set it up there will be three people testify about the events and the others will be testifying just in terms of identification. I think that will just be corroborative and won't take very long.

I will say this: There is a large dispute as to the testimony regarding the Priscilla Stephens affair and that might [fol. 130] take a considerable length of time. We discussed that with Mr. Messer.

Thereupon, ORVILLE HOPKINS, called as a witness by the plaintiff, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Messer:

Q. Your name is Orville Hopkins?

A. Yes, sir.

Q. What position do you hold with the City of Tallahassee?

A. City Manager.

Q. Were you present at the Tallahassee Municipal Airport during the afternoon of June 15th, 1961, Thursday afternoon?

A. Yes, sir, part of the time.

Q. Were you present when these defendants were at the airport?

A. Yes, sir.

Q. Did you have occasion to use one of the food vending machines?

[fol. 131] A. Yes, sir.

Q. What did you use it for?

A. I used it to purchase a sandwich and also to purchase a cold drink, I believe an orange drink.

Q. What coin did you deposit in the machine to receive the sandwich?

A. I deposited a quarter in the machine to receive the sandwich. I purchased a ham sandwich. It was made with a kind of bun affair with ham in the middle; very good.

Q. You received the sandwich?

A. Yes, sir.

Q. How much were you required to deposit in the machine or how much did you deposit in the machine to procure the cold drink?

A. 10 cents.

Mr. Messer: Your witness.

Cross-examination.

By Mr. Simon:

Q. You are the City Manager of the City of Tallahassee?

A. Yes, sir.

Q. How long have you been so engaged?

A. Nine and a half years.

Q. Are part of your duties the control and operation of the Tallahassee Municipal Airport?

[fol. 132] A. Yes, sir.

Q. Were you present at the conversation between City officials and the operators of the restaurant whereby a decision was reached to close the restaurant if these Freedom Riders came out to the airport?

A. I discussed it with them, yes. I don't think we had any meeting of any kind. We discussed it back and forth, yes.

Q. Who is "we"?

A. Myself and the operators of the restaurant.
Q. Is that Mr. Isdell?
A. Yes.
Q. When did this conversation take place?

Mr. Messer: If the Court please, I am going to object to that line of cross examination. I asked Mr. Hopkins questions relating to the vending machines.

Mr. Simon: If Your Honor please, I am going to tie this in to the use of the vending machines. The reason we are contending why the price went up is because the restaurant was closed.

The Court: Nobody said the price went up but you, Mr. Simon, and Mr. Hopkins testified about the operation of two vending machines on direct examination and you know that your cross examination is limited to those things brought out on direct.

Objection is sustained.

[fol. 133] Mr. Simon: Then at this time we will ask no further questions of the City Manager and we will request the Court order he stay here so he can make himself available as a witness, an adverse witness, on behalf of the defendants at such time as we are able to present our case.

The Court: You will be around until 5:00 o'clock?

The Witness: Yes, sir. My office can contact me any time you need me.

(Witness excused.)

Mr. Hill: For the record, this is a new witness who has not been sworn and who has been outside of the courtroom and this court for the entire proceeding.

* * * * * * *

[fol. 148] Thereupon, W. D. Hopkins, called as a witness by the plaintiff, having been first duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Hill:

Q. State your name for the record, please.
A. W. D. Hopkins.

Q. What is your occupation?

A. I am State Attorney, Second Judicial Circuit, State of Florida.

Q. How long have you been such State Attorney?

A. I have been State Attorney for approximately 15 years.

Q. Were you at the Tallahassee Municipal Airport on Thursday night at or about 11:00 p.m. or in that neighborhood?

A. I was.

Q. Would you tell us how you happened to be there?

A. I have a radio in my car and I got a radio call asking me to come to the airport.

Q. Who is your radio connected with, the Tallahassee Police Department or the Sheriff's Office?

A. Sheriff's Department.

Q. So then, your call emanated from some aspect of [fol. 149] the Leon County Sheriff's Department then?

A. From the jail; that is part of the Sheriff's Department, yes.

Q. Did you go to the airport at that hour?

A. I arrived there, I assume, about 10:30 to 11:00 p.m.

Q. Did you notice or find anything unusual out there, Mr. Hopkins, at that time?

A. I found an abnormally large crowd of people there upon arrival.

Q. Was the atmosphere there such as to indicate to you that there might be serious breaches of the peace, Mr. Hopkins?

Mr. Simon: I object on the grounds that this calls for a conclusion of the witness. There is no testimony showing any predicate for this type of conclusion.

Mr. Hill: If Your Honor please, I think a man of Mr. Hopkins' stature who has been the State Attorney for this Judicial Circuit as long as he has is certainly predicate enough to ask him a question as simple as that.

The Court: We have had the same argument on every witness so far.

Objection is overruled.

Q. Answer the question, please, sir.

A. I hate to ask it but will you repeat the question?

Q. I said did you find anything out there that was in [fol. 150] your opinion likely to cause serious breaches of the peace?

Mr. Simon: Same objection.

A. My answer to that is yes.

Q. Have you talked to me about this on the telephone yesterday?

A. I have talked to you about it.

Q. Would you tell this Court and this record what you told me at that time?

Mr. Simon: I object to that, Your Honor. I am not interested and this Court isn't interested in what he told Mr. Hill yesterday on the telephone.

The Court: He is interested in what you found that led you to conclude that (addressing the witness).

Mr. Simon: Could I have the question clarified for the purpose of the record? I think that is what he meant but I would like to have a proper question there.

The Court: The question is what facts and circumstances he found that caused him to conclude as he did.

Mr. Simon: If that is the question, all right.

A. Upon arrival at the airbase I found a number of people sitting inside on the benches and chairs where they normally sit. I saw a number of police officers both inside and outside of the building. I also saw some Highway Patrol officers there at the scene.

[fol. 151] I saw parked out in front some three or four automobiles containing from three to five, maybe six people. Some of their faces I recognized and some I didn't.

From talking to the people there and seeing the scene I knew that those people outside would have given trouble if the officers had not been present to take care of the situation.

Q. Mr. Hopkins, in order to clear the record when you say airbase you are referring to the vernacular in Tallahassee, that is the Tallahassee Municipal Airport?

A. That's right.

Mr. Hill: Mr. Simon, your witness.

Cross examination.

By Mr. Simon:

Q. This is what you saw Thursday night?
A. Thursday night. I was out there only on Thursday night.

Mr. Simon: No questions.
The Court: He can be excused, is that right?
Mr. Simon: Yes.

(Witness excused.)

The Court: How much do you anticipate longer this will take?
Mr. Hill: I would like to recall Mr. Messer.
Mr. Simon: You are recalling Mr. Messer?
[fol. 152] Mr. Hill: Yes, sir. May I?
Mr. Simon: No objection.
Mr. Messer: It will be very short.
The Court: Is this your last witness before resting?
Mr. Hill: Yes, sir.
The Court: Go right ahead.

Thereupon, JAMES MESSER, JR., recalled as a witness by the plaintiff, having been previously duly sworn, resumed the stand and testified further on his oath as follows:

Direct examination.

By Mr. Hill:

Q. You are Mr. James Messer, Jr. who has heretofore testified today?
A. Yes.
Q. Did you buy any food or cigarettes at the airport, at the Municipal Airport, any time Thursday or Friday?
A. I bought a package of Salem cigarettes Thursday afternoon and again on Friday morning.

Q. How much did you pay for them?
[fol. 153] A. 30 cents. I paid 25 cents, a quarter, and a nickel in the machine.
Q. On each occasion or on one occasion?
A. On each occasion.
Q. That was an automatic vending machine?
A. Yes.

Mr. Hill: Your witness.

Cross examination.

By Mr. Simon:

Q. You bought two packs of cigarettes?
A. One pack on Thursday and one pack on Friday.
Q. Then you believe that Mr. Spencer who said he only sold one pack made a mistake?
A. He must have because I got the cigarettes.
Q. Either you or Mr. Spencer is making a mistake, is that correct?
A. Evidently.

Mr. Simon: Thank you.

Plaintiff Rests

Mr. Messer: If the Court please, the City will rest its case.

Renewal of Motion of Defendants to Quash and to Dismiss the Charges and Denial Thereof

Mr. Simon: At this time, if Your Honor please, the defendants will renew their motion to dismiss made before the State put on its case and at the conclusion of all the State's testimony we renew our motion on exactly the self same grounds as heretofore stated.
[fol. 154] The Court: Motion is denied.
How long do you anticipate in the presentation of your case?
Mr. Simon: About two hours.
Mr. Dixon: That all depends upon the length of cross examination by City's counsel.

Mr. Simon: That includes reasonable cross examination except, Your Honor, I will say that the single issue that remains as I regard it is the greatly disputed fact as to one of these defendants.

The Court: I had several other matters to try this afternoon.

Mr. Messer: Excuse me, Your Honor. May I interject this? I have reference to the case against Priscilla Stephens; it may be that we will have to set that for another date.

Mr. Simon: Possibly.

The Court: Well, the Court will recess now until 2:00 o'clock and, Mr. Clerk, all the cases that are previously set for this afternoon, let me check my calendar for tomorrow and see if I can try them tomorrow afternoon instead of this afternoon and I will make an announcement on that at 2:00 o'clock.

(Whereupon, at 1:00 o'clock p.m. a luncheon recess was taken until 2:10 o'clock p.m.)

[fol. 155] AFTERNOON SESSION

Mr. Simon: Your Honor, the Everett case is tied into these events somewhat. I don't think it would take very much additional testimony to present the case for or against him. We have been retained to represent him and I would appreciate it if he could be heard in conjunction with these matters.

The Court: I don't see where it has any connection with these cases at all.

Mr. Simon: He was picked up outside the bus terminal. He was taking people out there.

The Court: His case will have to be heard tomorrow at 2:00.

Mr. Messer: The City has rested its case. It is possible there may be some rebuttal testimony only as to the hour of the arrest of the defendants, that is the time.

Some of the witnesses for the City want to know if they can come into the courtroom. Do you know of any reason, Mr. Hill, why you intend to recall anybody?

Mr. Hill: Not right now.

Mr. Messer: We don't know now—

The Court: If there is any possibility that something will develop they ought to stay under the Rule.

Mr. Hill: There is that possibility.

[fol. 156] Mr. Simon: Are any of these people that are coming in going to testify?

Mr. Messer: No, none of them have testified and will not be called to testify.

The Court: The City has rested. A motion for a directed verdict has been denied.

Mr. Simon: The defense calls as its first witness Reverend J. W. Collier, Jr.

The Court: You were sworn this morning?

Defendant Collier: I was.

Thereupon, J. W. Collier, Jr., defendant, called as a witness in his own behalf, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Simon:

Q. Please state your name and your address.

A. John W. P. as in Paul Collier, C-o-l-l-i-e-r, Jr., 310 Meeker Avenue, Newark, New Jersey.

Q. What is your occupation or profession?

[fol. 157] A. I am a minister of the gospel.

Q. What denomination?

A. African Methodist Episcopal Church.

Q. How long have you been so engaged?

A. The past 23 years.

Q. Have you had any educational training for this position?

A. I have. I completed college at Wilburforce University receiving the degree of Bachelor of Science and Social Administration. I did my graduate work at Paine Theological Seminary at Wilburforce receiving a degree of Bachelor of Divinity. I did my residence work for Master of Arts degree at Drew Theological Seminary.

Q. Do you presently hold an active pulpit?

A. I do.

Q. Where and for what church?

A. The Israel Memorial African Methodist Episcopal Church in Newark, New Jersey.

Q. On or about June 12th, 1961 did you arrange for yourself with others to become an interstate passenger in a trip that was to originate in Washington, D. C.?

A. I did.

Q. Did you embark upon this trip?

A. I did.

[fol. 158] Q. What was the date of embarkation?

A. The 13th of June which was Tuesday.

Q. 1961?

A. 1961.

Q. At that time did you have in your possession tickets on common carriers from Washington, D. C. to other destinations?

A. We did.

Q. Which tickets did you hold, on what carriers, and what was your destination?

A. Bus tickets issued by the Greyhound Bus Company from Washington, D. C. to Tallahassee, Florida.

Q. Did you also have at the time of your embarkation from Washington, D. C. in your possession or did you have arrangements to secure airline tickets from Tallahassee, Florida to other points?

A. We did. From Tallahassee, Florida back to Newark or New York, one or the other.

Q. On what airline?

A. Eastern Airline.

Q. Where was that flight to originate?

A. That flight was to originate in Tallahassee, Florida.

Q. That flight was to terminate either in Newark or [fol. 159] New York?

A. Newark or New York.

Q. Were you at the time of your embarkation in the company or presence of other persons whose destinations were the same as yours?

A. I was.

Q. Are these other persons or were there among these other persons the nine defendants who are here with you today who are designated as Freedom Riders?

A. These nine (indicating) were with us in a part of our group.

Q. Did you ultimately arrive at Tallahassee, Florida?

A. We did.

Q. In what manner of transportation did you arrive in Tallahassee, Florida?

A. We arrived by Greyhound bus.

Q. What was the date of your arrival?

A. We arrived on the morning of Thursday, June 15th.

Q. How many persons were there in your group altogether?

A. There were 18 of us in our group altogether.

Q. Did you have an express purpose in making this trip?

A. We did.

Q. What was that purpose?

[fol. 160] A. There was a two-fold purpose: First, we wanted to ascertain whether or not there were facilities available on an integrated basis to interstate passengers in waiting rooms, in rest rooms, in eating facilities in the terminals through which we would pass.

Secondly, we wanted to bear our witness as ministers, rabbis and clergymen to the struggle to obtain these rights guaranteed us by the Constitution.

Mr. Dixon: Would you talk to the Judge?

The Court: I can hear all right.

Q. Through what cities did you pass from the time that you left Washington, D. C. on June 13th until you arrived in Tallahassee, Florida on June 15th?

A. We passed through Richmond, Virginia, through Raleigh, North Carolina, through Sumpter, South Carolina, through Savannah, Georgia, through Jacksonville, Florida, through Lake City, Florida and eventually to Tallahassee.

Q. Did you test whether or not the facilities of the terminals in each of these cities were available to you and your group on an integrated basis in each of these cities?

A. We did.

Q. Was the group that left Washington, D. C. both negro and white in its composition?

A. It was so constituted.

[fol. 161] Q. Are the defendants presently before this Court both negro and white in their composition?

A. We are.

Q. What is your color?

A. Negro, negro American.

Q. Did you on Thursday, June 15th, 1961 arrange to be transported to the Tallahassee Municipal Airport in or near Tallahassee, Florida?

A. We did.

Q. About what time did you arrive at the Tallahassee Municipal Airport?

A. Approximately 1:30 in the afternoon of Thursday, the 15th.

Q. Did you at this time have in your possession an airport ticket on any carrier?

A. I did; I had an airplane ticket on Eastern Airlines to Newark, New Jersey.

Q. Did you have a reservation for a flight out?

A. I did.

Q. What time was that flight to leave?

A. That flight was to leave in the afternoon at 3:25 p.m.

Q. What was your purpose in going to the Tallahassee Municipal Airport at the time and on the date I have just indicated?

[fol. 162] A. We went to the airport in order to board the plane.

Q. Did you have any other purpose?

A. Our purpose was, inasmuch as there was time prior to the departure of the plane and since I among others had not eaten, to eat prior to leaving and to test the facilities as I indicated earlier.

Q. Did you test the facilities of the Tallahassee Municipal Airport terminal?

A. Those that were available to us.

Q. Which facilities were those?

A. The waiting room, and the rest rooms.

Q. Did you ascertain how many rest rooms were available in the terminal?

A. I did. I noticed that there were four rest rooms.

Q. How were they designated?

A. White Ladies, White Men, Colored Ladies, Colored Men or designations to that effect.

Q. Did you ascertain how many waiting rooms there were?

A. I did. There were two.

Q. Were they designated in any manner?

A. The sign pointing to the smaller was marked Colored Waiting Room.

Q. Did you ascertain whether or not there were any restaurant facilities at the terminal?

[fol. 163] A. I did.

Q. What did you ascertain?

A. That there was one large glass enclosed restaurant. Around the corner was a counter in front of which were five or six stools. On the counter was a sign "Colored."

Q. Were you able to secure any food to eat at this time?

A. I was not.

Q. Why not?

A. The restaurant door was closed and the sign on the panel next to the door marked "Closed."

Q. At the time that you arrived did you see any persons eating in the restaurant?

A. Yes. There were four or five persons eating in the restaurant when we arrived.

Q. Were these white or negro persons?

A. They were white persons.

Q. Can you describe the sign that was put on the door?

A. The sign was approximately 12, I would say, by 20 inches, a gray sign with "Colored"—I mean "Closed" marked on in black letters.

Q. Was that a printed or handwritten sign?

A. Handwritten sign.

Q. How many in your group arrived at the Tallahassee [fol. 164] Airport at the time that you indicated?

A. All of us, 18.

Q. Did any of your group leave on the Eastern Airlines Flight that you had reservations for?

A. Yes, a part of our group did; eight, in fact.

Q. What time did they leave?

A. At 3:25, the scheduled time of departure.

Q. Did the remaining ten leave at that time?

A. No. The remaining ten remained.

Q. Did you cancel your reservations?

A. We cancelled our reservations.

Q. Were arrangements made for additional reservations?

A. Reservations were made additionally at the time of the cancellation.

Q. For what time did you make reservations to leave?

A. There was a firm reservation made for Saturday morning of the 17th with a request for an earlier reservation and the assurance given that earlier reservations would be sought.

Q. You were one of the people that remained?

A. I was one of those that remained.

Q. What was your reason for cancelling your reservation?

A. In the first place, we were denied entrance into the restaurant facility. We were told by the manager that the restaurant would reopen at 4:30 and we were waiting so [fol. 165] we might be served.

Q. Did the restaurant open at 4:30?

A. The restaurant did not reopen.

Q. How long did you remain in the terminal?

A. Until approximately five minutes before midnight when we were informed that we would have to move.

Q. Did you at that time leave the terminal?

A. I did.

Q. At that time did you have reservations for flight outside the State of Florida?

A. I did, the reservation being for the next morning, Friday, the 16th, leaving at 8:38.

Q. Were these reservations for all ten persons of your group?

A. For all ten persons in the group, yes.

Q. Did you subsequently return to the Tallahassee Municipal Airport?

A. We did.

Q. When was that?

A. On Friday morning at approximately 7:25 or 7:30.

Q. What was your purpose for returning to the Tallahassee Municipal Airport on this occasion?

A. To board the plane on which we held reservations leaving at 8:38.

[fol. 166] Q. Did you have any other purpose?

A. To be served in the restaurant prior to leaving.

Q. Did you secure service from the restaurant?

A. We did not.

Q. Why not?

A. The sign still indicated that the restaurant was closed.

Q. Did you leave on the flight for which you had reservations at the time that you arrived at the airport on Friday morning?

A. I did not.

Q. Did any of your group leave on that flight?

A. None of our group left on that flight.

Q. Did you cancel your reservations?

A. We did.

Q. Did you secure new reservations?

A. We did. The reservation for Saturday morning was still available to us so we were at no time without reservations.

Q. What was your purpose in cancelling the reservation?

A. Awaiting service in the restaurant facility in accordance with the promise of the manager that it would be open.

Q. During the morning of Friday, June 17th, did you make any other reservation for a flight beyond the State of Florida?

A. You said Friday, June 17th.

[fol. 167] Q. Friday, June 16th, I mean.

A. I am not certain. I know another reservation was made. I think it was the afternoon flight.

Q. Did you subsequently cancel that flight?

A. We subsequently cancelled that flight.

Q. What was your reason for cancelling that flight?

A. Service had still been denied us in the restaurant in the airport terminal.

Q. Were you in the Tallahassee Municipal Airport terminal on the morning of Friday, June 16th, 1961 at approximately 12:00 o'clock?

A. I was.

Q. Were the other nine members of your group with you?

A. They were.

Q. During the period of time that ensued from the moment you first arrived at the airport until that time will you describe your conduct to the Court?

A. We sat in the lobby, in the waiting room; we read the newspapers; we read books which members of our party had with us and we quietly conversed among us.

Q. Were you loud, noisy or boisterous in any manner?

A. At no time in any way.

Q. Did you at any time threaten any person or persons?

A. We did not.

[fol. 168] Q. What is the profession or occupation of the remaining nine members of your group?

A. All are rabbis or clergymen; two are rabbis, eight are clergymen.

Q. Did you meet Mr. James Messer at the Tallahassee Municipal Airport on or about 12:00 or 12:30, approximately noon on Friday, July 16th, 1961?

A. I did.

Q. Did he make any statements to you?

A. He did.

Q. Do you recall, to the best of your recollection, what was the statement he made to you?

A. Yes. I jotted down the substance of the statement that he made at the time as the statement was read.

The statement said, in effect, that our presence there at the airport would tend to incite to riot on the property owned by the City. We were commanded to disperse, the alternative being arrest for unlawful assembly. We were given 15 seconds to make our decision.

Q. Did you within that period of time make a decision as to whether or not you would leave the premises?

A. I did.

Q. What was that decision?

A. To remain.

[fol. 169] Q. Did the other nine clergymen with you at this time make a decision with regard to whether or not you should leave the premises?

A. They did.

Q. What was that decision?

A. To remain.

Q. At this time and place had the terminal become filled with a number of other persons?

A. Not filled. There were a number of police officers who came in with Mr. Messer, with Mr. Stoutamire and with the Lieutenant. There were a few persons who were not police officers nor members of our group.

Q. Were there with you or seated with you at the time Mr. Messer read his announcement any other persons?

A. There were.

Q. Who were those persons?

A. Miss Priscilla Stephens, Jeff Poland, the Reverend Mr. Speed and two young men. Their last names are Steele. I am sorry, I don't remember their first names.

Those are the persons whose names I recall. There are possibly two or three others. I'm sorry, also the Reverend Mr. Hunter.

Q. Do you know whether or not they remained with your group following Mr. Messer's announcement or whether or [fol. 170] not they removed themselves from the terminal?

A. They removed themselves from the terminal.

Q. What happened to you and the other nine clergymen when you refused to relinquish your seats in the lobby of the terminal?

A. We were placed under arrest. We were told to pick up our luggage and "let's get going."

Q. Did you comply with that request?

A. We did.

Q. What happened next?

A. We went out of the front door, the entrance to the terminal, where the police cars were lined up. We were ordered to get into the police cars. We did.

Q. You were then taken to the jail?

A. Brought to the City Jail.

Q. Did you have the occasion to notice whether or not when you arrived at the Tallahassee Municipal Airport on Thursday, June 15th, there were in the terminal vending machines which dispensed food, cigarettes or Coca Colas?

A. There were two machines; one dispensing sandwiches, the other dispensing Coca Colas.

Q. Were you able to ascertain at what price?

A. I did. The prices were 25 cents and 35 cents on the sandwiches and 10 cents for Coca Colas, I believe.

[fol. 171] Q. How much for the cigarettes?

A. There was no cigarette vending machine in there at the time.

Q. Between the time that you first entered the terminal and the time that you were arrested and left was a cigarette vending machine brought to the premises?

A. The cigarette vending machine was brought to the premises.

Q. Was the price of the cigarettes announced on the cigarette vending machine?

A. Yes. There was a sign placed inside the glass reading "Cigarettes, 60 cents."

Q. Were there any changes made in the cost of sandwiches and soft drinks that were sold through the other vending machines?

A. The price of sandwiches went up to 55 cents for all of the sandwiches. There was no change in the price of the Coca Cola machine but the sign was placed on it "Plenty of cokes, ice making machine temporarily out of order."

Q. Do you recall in what manner the machines were adjusted to increase the price of the sandwiches?

A. The vending machine operator as he opened the machine manipulated the coin mechanism. What was done I don't know but there was a manipulation that was visible to me.

Q. By whom?

[fol. 172] A. By the vending machine operator or service man—

Q. Some person did this?

A. (Continuing) —that brought the machine in.

Q. When was this?

A. That was on the afternoon of Thursday.

Q. You were in the courtroom this morning when you heard the testimony of the various witnesses on behalf of the State of Florida and the City of Tallahassee?

A. I was.

Q. You have heard them on a number of occasions use the word Freedom Riders, did you not?

A. I did.

Q. Did you comprehend and understand what those words meant?

A. Yes.

Q. What did they mean?

A. A group of persons traveling on an interstate basis integrated.

Q. Do you understand that the term was properly applicable to yourself and to the nine other persons with you?

A. Yes, we were Freedom Riders.

Q. You heard the testimony also, did you not, of Mr. Paul J. Cannedy, the manager for Eastern Airlines?

A. I did.

[fol. 173] Q. Did you hear his testimony to the effect that all of the facilities of the terminal were under one roof?

A. I did.

Q. Are you able to advise us as to whether or not from your observation that testimony was correct?

A. That testimony was correct from my own observation.

Q. Did you hear him testify to the effect that the restaurant, rest rooms and lobby facilities were an integral part of the terminal and were for the purpose of serving interstate passengers on the airlines?

A. I did.

Q. From your observation of the terminal was that statement correct?

A. That statement was correct from my observation.

Mr. Simon: You may inquire, sir.

Cross examination.

By Mr. Messer:

Q. Reverend Collier, I believe that you stated that you are the pastor or minister of the Israel Methodist Episcopal Church. I didn't catch the town.

A. Israel Memorial African Methodist Episcopal Church in Newark, New Jersey.

Q. Is that a church in which the doctrines of Christianity are advocated by you as minister?

A. Very definitely.

[fol. 174] Q. I was a little confused at the term "Israel". You are a Christian minister?

A. Yes, I am. I can tell you one of the founders of our church was a man whose last name was Israel and it was named in honor of him.

Q. How long have you known the other nine defendants that elected to stay over at the Tallahassee Airport?

A. Since last Monday, since Monday, the 12th.

Q. How did you happen to meet them?

A. We met in the City of Washington, the point from which our trip started.

Q. You had never known them before?

A. I had not known them before, that's correct.

Q. Who arranged for your meeting?

A. The Congress of Racial Equality, an organization known as CORE.

Q. In effect, then, CORE or the Congress of Racial Equality arranged for this trip in which you were the leader?

A. I was one of the members.

Q. You were the spokesman for the group?

A. I was the spokesman for the group after we left—after we arrived in Tallahassee.

Q. Do you recall the time of your arrival at the Tallahassee bus station?

[fol. 175] A. We arrived in Tallahassee at the bus terminal at 12:40 p.m. on Thursday, the 15th.

Q. What did you and the members of your group do upon arrival at the Greyhound bus terminal?

A. We went into the terminal, some went into the waiting room, some went into the rest rooms, others went to the restaurant facility, that counter.

Q. I believe that you stated that you did not eat at the bus terminal?

A. I had something to eat. I had a cup of coffee. I did not have a meal.

Q. Why didn't you eat with the rest of your group?

A. All of us didn't eat. There wasn't time. We knew our flight departure was near at hand and we had to check in and confirm the flight and we wanted to have time for that.

Q. Do you know of the time that you left the bus terminal?
A. It was approximately 1:30.
Q. Then you proceeded to the Tallahassee Municipal Airport?
A. Correct.
Q. By private transportation?
A. Cars.
Q. Do you know how far the Tallahassee Municipal Air-
[fol. 176] port is located from the Greyhound bus terminal?
A. I do not.
Q. Several miles?
A. I would agree.
Q. Do you know approximately the time of your arrival at the Municipal Airport?
A. I would say between 1:45 and 2:00 o'clock.
Q. 2:00 o'clock is usually rather late for a lunch time, isn't it?
A. Not for me.
Q. It would be for those who already had lunch, wouldn't it?
A. I would not be prepared to say. It depends on how much lunch they had and what they wished.
Q. Now, do you recall the approximate hour or time of your arrest by the Police Department after I had read the proclamation or order of dispersal?
A. 12:45.
Q. 12:45?
A. Yes.
Q. Did you have a long distance telephone conversation with 15, 20 or 10 minutes prior to your arrest?
A. I did.
Q. With whom did you have that long distance conversa-
[fol. 177] tion?

Mr. Simon: Just a moment, please. Excuse me, Mr. Messer. Am I incorrect in assuming that some of the witnesses for the City are presently in the courtroom?

Mr. Messer: None that we are going to use or none that we have used.

Mr. Simon: I think the City Manager is here if I am not mistaken.

Mr. Messer: Is the City Manager in the courtroom?
Mr. Simon: I may be in error then. I am sorry.
Mr. Messer: That's all right.

Q. With whom did you have the long distance telephone conversation?
A. With Mr. Bert Marshall, the Assistant Attorney General in Washington.
Q. Did you place that call?
A. I did not.
Q. He called you?
A. He called me.
Q. How long did you talk with Mr. Marshall?
A. I would say not more than two minutes.
Q. How was that conversation terminated?
A. The conversation was terminated by me indicating—by me.
[fol. 178] Q. Was it a voluntary termination?
A. On my part?
Q. Yes.
A. Yes, it was.
Q. There was no interference on the part of anyone in connection with your termination of the call?
A. I would not have terminated the conversation had it not been for the fact that the policemen were coming in and as a member of the group and the leader of the group I wanted to be with the group.
Had it not been for their entrance I would not have terminated the conversation.
Q. As a matter of fact, you were informed that the police officers were arriving at the airport but you did not see them arrive while you were in the telephone booth?
A. I did not.
Q. A member of your group gave you the information?
A. That's correct.
Q. There was no effort on the part of anybody, whether connected with the City of Tallahassee or not, that forced the termination of that long distance conversation?
A. By a physical act?
Q. By word or act or anything.

A. The entrance of the policemen into the terminal to [fol. 179] apprehend us was the factor that caused the termination of the conversation.

Q. But you did not see the entrance of the policemen into the terminal while you were on the telephone?

A. I did not see that, no.

Q. You were informed of that—

A. Yes.

Q. (Continuing) —by one of your group?

A. One of our group.

Q. You voluntarily terminated the conversation?

A. Yes.

Q. Were you interfered with in any way, or your group, in using the seating facilities at the waiting room in the lobby there of the Municipal Airport—

A. At no time.

Q. (Continuing) —until the police officers caused your arrest on Friday morning?

A. At no time.

Q. You were not interfered with in any way with the use of the rest rooms that you chose to use?

A. We were not.

Q. Now, the facilities at the restaurant out at the airport where you described that the sign read "Closed", were there any persons admitted to the facilities while that sign was there?

[fol. 180] A. Not that I saw.

Q. Irrespective of race, whether they were white or negro?

A. Not that I saw.

Q. If there was discrimination in regard to the availability of the restaurant facilities it was discrimination against the general public, was it not?

A. I would not say when the sign distinctly said "Colored" on the little counter around the corner.

Q. Nobody used the facilities, nobody was afforded use of them, were they?

A. Nobody was there to wait on anyone.

Q. So that the whites were denied access as well as the negroes, isn't that a fact?

A. The whites in our part of the restaurant—it was closed and we were not permitted entrance.

Q. No one entered—

A. Nobody entered to my knowledge.

Q. (Continuing) —whether in your group or without your group?

A. That's correct.

Q. On Thursday night when the last plane had left and I am referring to the National Airlines flight—I believe it is National—did you make any request for police protection?

[fol. 181] A. I did.

Q. What was the reason why you made that request, Reverend Collier?

A. Mr. Stoutamire called me and told me that we would have to leave or announced that we would have to leave because the terminal was closing. He mentioned the fact there was a menacing crowd around earlier and in view of that I asked if we might have protection because of what he said was a menacing crowd gathering outside.

Q. Did you have any apprehension that you needed protection?

A. I took his word for it.

Q. You believed him?

A. I believed him.

Q. What about on Friday morning when you wanted to go back to the airport and a request for police protection was made? Did you think that was necessary?

A. No. When we arrived in town on Thursday night we told the officer what time we would be going back in town in the morning and we were told he would be there.

Q. Didn't you ask for police protection going back out?

A. I honestly don't recall that I did.

Q. Do you know whether or not anyone in your group did?

[fol. 182] A. I don't know whether anyone in the group did. I was serving as spokesman for the group and I don't recall that I did.

Q. Do I understand that your group was composed of how many rabbis?

A. Two rabbis.

Q. Two rabbis?

A. That's correct.

Q. How many Christian ministers?

A. Eight.

Q. As I understand it Christian ministers advocate the divinity of Jesus Christ?

A. That's correct.

Q. And the rabbis deny it?

A. I would prefer that they speak for themselves on their manner of religion.

Q. I think it rather strange that such opposite views, persons who had never met each other until they convened in Washington, would travel together, eat together and possibly sleep together. That is the reason I asked the question.

A. We share a common background. Christianity certainly is a development out of Judaism and we share a belief in one God Who was the Father of us all, Who made us all equal in His own image. All of us believe that in common.

[fol. 183] Q. But you don't share the common belief in the divinity of Jesus Christ?

A. Our beliefs differ at that point as our beliefs among Protestants differ at several points.

The Court: I think that is enough philosophy today so let's go ahead.

Q. None of your group have been mistreated in any way by any official connected with the City of Tallahassee, have they?

A. We were not mistreated. We were denied, however, the privilege of placing our telephone calls for six hours after we were apprehended.

Q. That is while you were being identified and fingerprinted and so forth?

A. Yes. That took no more than an hour so there were at least five hours after that.

Q. At the time that you were arrested what airline reservations did you have?

A. I believe it was Eastern Airlines. I'm not certain.

Q. What time were those reservations for? What was the flight number?

A. I don't recall the flight number.

Q. Actually, you left by National Airlines the next day, didn't you?

[fol. 184] A. It may then have been that.

Q. But you had cancelled out your National Airlines reservations that left Tallahassee on Friday, June 16th at 1:49 p.m.?

A. There had been cancellations. I don't know precisely what they were. There were different members of our party that had responsibilities and that was not mine.

Q. You were making and cancelling and making and cancelling, or your group was?

A. That's correct, or cancelling and making.

Mr. Messer: That is all.

(Witness excused.)

Thereupon, MARTIN FREEDMAN, defendant, called as a witness in his own behalf, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Simon:

Q. Please state your name, sir.

A. Rabbi Martin Freedman.

Q. What is your residence?

A. 345 East 42nd Street, Paterson, New Jersey.

[fol. 185] Q. What is your profession or occupation?

A. I am a minister or a rabbi.

Q. How long have you been so engaged in this profession?

A. I was a student rabbi before my ordination for four years. I was ordained in 1955 and have been serving the congregation B'Nai Jeshrun in Paterson, New Jersey, for the past four and a half years.

Q. Are you currently the spiritual leader of that congregation at the present time?

A. Among other positions that I hold this position is the major one.

Q. What educational background or degrees do you have to equip you for this work?

A. I have a B.A. degree from Washington Square College, New York University. I have my residence requirements for a Doctorate from Columbia University. I was ordained by the Hebrew Union College, Jewish Institute of Religion, after five and a half years of study where I received my BHL degree.

Q. On Monday, June 12th, 1961 did you join a group in Washington, D. C. of which Reverend Collier who just testified was a part?

A. I did.

Q. Did you at that time possess tickets on an interstate carrier from Washington, D. C. to points beyond that?

[fol. 186] A. I did.

Q. What tickets did you hold on that occasion and what were the destinations indicated thereon?

A. I held in my possession a set of tickets on a Greyhound bus from Washington, D. C. down through the various cities in the States of Virginia, North Carolina, South Carolina, Georgia and Florida, terminating in Tallahassee, Florida.

Q. How many were in your group?

A. There were 18 members in our party including myself.

Q. Did the group have a common purpose in making this trip?

A. Yes, it did.

Q. What was that purpose?

A. The common resolve of the group was to test all facilities for interstate passengers on buses and terminals at every place along our journey and to test these facilities in terms of their integrated character.

Q. When did you arrive in Tallahassee, Florida?

A. We arrived in Tallahassee, Florida on Thursday at I believe approximately 12:40 p.m.

Q. Did you at that time have in your possession an airport ticket on an interstate air carrier from Tallahassee to points beyond the State of Florida?

A. I did.

[fol. 187] Excuse me. If you mean at the moment of arrival—

Q. Or shortly thereafter.

A. Shortly thereafter I had that in my possession.

Q. Whose ticket was that?

A. I had a ticket on an Eastern Airlines flight scheduled to leave at 3:25 p.m. that afternoon for Newark Airport via Atlanta, Georgia.

Q. What time was that flight supposed to leave?

A. At 3:25 p.m.

Q. Did you prior to that time arrive at the Tallahassee Municipal Airport?

A. Yes, I did.

Q. Did you keep the reservation on the flight you have just indicated?

A. No, I did not.

Q. Did any of your group do so?

A. Yes. Eight members of our group fulfilled the original plan and departed at 3:25 p.m. on that flight.

Q. How long did you remain in Tallahassee?

A. I remained in Tallahassee until Saturday afternoon and that date is—I have lost the track of time—June 17th at approximately 3:00 p.m.

Q. What did you do at that time?

A. At that time I boarded a National Airlines flight [fol. 188] from Tallahassee, Florida to Jacksonville, Florida with arrangements made to catch a plane in Jacksonville for Newark Airport.

Q. Were the rest of the members of your group with you on that trip?

A. They were not all of them with me. Seven other members of our group were with me at that time.

Q. The remaining two?

A. The remaining two were here in Tallahassee, Florida and remained behind.

Q. How long did you remain at the airport, at Tallahassee Municipal Airport?

A. I should say approximately—do you mean on Saturday afternoon?

Q. No. From the time that you arrived on Thursday, June 15th until Friday, June 16th.

A. We arrived at the airline terminal at approximately

1:45 p.m. Thursday and remained in the airline terminal until 11:45 on Thursday—Friday I mean.

Q. Were all of the facilities of the terminal available to you?

A. They were not.

Q. Which facilities were not available to you?

A. Insofar as I could determine the one facility which was unavailable to us was the restaurant.

[fol. 189] Q. Was that open or closed?

A. It was closed.

Q. Was it closed at all times until you left Tallahassee?

A. Yes, it was.

Q. Were you arrested on Friday, June 16th at about 12:30?

A. Yes, I was.

Q. What is your color?

A. White.

Q. Were you part of a group of people known as the Freedom Riders?

A. Yes, I was.

Q. You have heard Mr. Messer utilize that term this morning, have you not?

A. Yes, I did.

Q. Does that term have any special meaning to you?

A. Yes. I believe it is a designation applied to a group of people who travel on interstate facilities testing their integrated character.

Q. Is the application of that term to you proper?

A. I believe it is accurate and proper.

Q. You have heard the testimony given by Reverend Collier just before yours?

[fol. 190] A. Yes, I have.

Q. Did you find his testimony concerning the events that took place and what occurred to you in Tallahassee between Thursday, June 15th, and Saturday, June 17th, 1961 true and complete?

A. Yes, I did.

Q. Is there any portion of his testimony with which you differ or which you feel is necessary to add or expound upon?

A. I feel that I may be able to elaborate upon some of the travel reservation arrangements on Friday.

Mr. Simon: You may inquire.

Cross examination.

By Mr. Messer:

Q. Rabbi, you mentioned that you were the rabbi of a synagogue, I believe, in New Jersey.

A. That is in Paterson, New Jersey. I also occupy a number of other positions as well.

Q. I understood your statement to that effect. Will you state those other positions that you occupy?

A. Yes. I occupy the post of Police Chaplain for the Police Department of the City of Paterson. I am also a training officer in the Police Academy for the County of Passaic and I am associated as Chaplain to the County Jail in Passaic County.

The Court: Order in the court. I see nothing amusing [fol. 191] at all about the man stating his position.

A. I am also an instructor at Columbia University associated with the Jewish Culture Foundation in New York.

Q. Who is filling your position with your synagogue in Paterson while you are away?

A. My ordained cantor.

Q. When did you first receive instructions or requests that you join the group of so-called Freedom Riders in Washington?

A. I knew of such plans approximately four days before arriving in Washington, D. C.

Q. From whom did you receive that notice?

A. It is hard to state, Mr. Messer, because I think I was a party to the decision originally made; that is to say that a number of ministers and rabbis gathering together in the Congress of Racial Equality in New York decided upon such an interracial interfaith bus trip.

Q. Had you known Reverend Collier before that time?

A. I knew of him through his brother, Mr. Benjamin Collier, who is the director of Paterson's Human Relations

Council, a paid official of the City. I did not know him personally.

Q. You said you were a party to the decision. Who were the other parties to that decision?

A. Various members of the organization known as the Congress of Racial Equality in New York along with some [fol. 192] Protestant ministers and also with the consultative advice of various other people in the City.

Q. In other words, it was a prearranged scheduled plan?

A. Oh, yes.

Q. Did you have occasion to have lunch at the bus terminal when you arrived?

A. I don't think I would call it lunch. I had a half a glass of milk and part of a piece of pie.

Q. Nobody prevented you from having more, did they?

A. Except that the service was exceptionally slow.

Q. You all were a little bit slow in arriving, weren't you?

A. Frankly, Mr. Messer, there were only two people serving the whole of the counter at the bus terminal and it was an interminably long time before we were served.

Q. If you arrived at 12:40 and it was an interminably long time before you were served how do you account for the fact you stated you left the bus terminal at 1:30 or are you mistaken as to the time?

A. I don't think I understand your question clearly.

Q. I am not going to ask you to answer the question.

Isn't it a fact that your companions who left on the flight at 3:25 on Thursday suggested you all accompany them?

[fol. 193] A. I believe this was a matter of personal decision. As you know, as ministers and rabbis we are all of us very much occupied with our duties. It was then a question for each man to determine how pressing his duties were.

The Court: The question was did they suggest that you come along with them?

Q. There were some members of the eight who made such a suggestion.

The Witness: I am sorry. I didn't understand the question (addressing the Court).

Mr. Messer: Thank you, Rabbi. That is all.

Redirect examination.

By Mr. Simon:

Q. When you arrived at the Tallahassee Municipal Airport on Thursday, June 15th did you notice whether or not there were persons eating in the restaurant at that time?

A. Yes, I did. There were a number of people who were eating in the restaurant. I could easily determine this because one whole wall of the restaurant exposed to the interior lobby of the airport terminal is composed of glass. There were people seated at tables eating food and I did not see any waitresses serving them but it appeared to me that they were completing meals.

Q. Did you have the occasion to see whether or not there were any changes made in the vending machines at the Tallahassee Municipal terminal?

[fol. 194] A. Yes, I did.

The Court: I heard about vending machines and all of it is completely immaterial and I am going to stop any further testimony along that line. I think we covered it from both sides.

Mr. Simon: Then we will, if Your Honor please, proffer that—

The Court: That his testimony would be the same as your other witness testified to?

Mr. Simon: Yes, sir.

The Court: All right, that will save some time.

Mr. Simon: Any other questions, Mr. Messer?

Mr. Messer: No further questions.

By the Court:

Q. Is this your first venture down South?

A. No. I have been in the State of Florida many many times.

Q. Why didn't you leave when Mr. Messer read the proclamation?

A. Frankly, Your Honor, I considered it a matter of personal honor to remain where I was because I considered it my right as a citizen of this nation and this country to exercise the privileges accorded to me as a citizen and I did not feel that Mr. Messer's order directly applied to me since I at no time in my presence in the Tallahassee Air-[fol. 195] port ever engaged in any disorderly behavior or in any—

Q. So in your personal judgment you decided to stay as against the police authority that directed you to move?

A. Yes, sir.

The Court: That is all.

(Witness excused.)

Mr. Simon: Could we have the bailiff call in Mr. Isdell?

The Court: This man was not sworn and was not under the Rule but he has been in court all afternoon listening.

Do you have any objections to that?

Mr. Messer: What is his name?

The Court: Mr. Isdell.

Mr. Hill: I have no objection.

The Court: The Rule was invoked but he has been in the courtroom.

Mr. Hill: I have no objection.

Mr. Messer: What is his occupation?

Mr. Isdell: Manager of the restaurant out at the airport.

Mr. Messer: We have no objection to his testifying.

[fol. 196] Thereupon, HUBERT A. ISDELL, called as a witness by the defendants, having been first duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Simon:

Q. Please state your name and your address.

A. Hubert A. Isdell, 1918 Chowkeebin, Tallahassee.

Q. What is your occupation or profession, sir?

A. Manager of the restaurant at the Tallahassee Airport.

Q. By whom are you employed?

A. The Union News Company.

Q. How long have you been so engaged?

A. At the airport, since March 29th, 1961.

Q. Is that when the restaurant opened up in the airport?

A. Yes, sir.

Q. How many restaurants are there in the Tallahassee Municipal Airport?

A. One.

Q. Is that restaurant divided into two sections?

A. Yes, sir.

Q. Are there any designations as to one or the other [fol. 197] of those sections of the restaurant?

A. Yes, sir.

Q. What designations?

A. The lunch counter has a sign "Colored" on it which is at the colored waiting room.

Q. From March 29th to June 14th of 1961 how many days a week was this restaurant open?

A. All of it.

Q. Is your restaurant open seven days a week?

A. Yes, sir.

Q. What are the hours of this restaurant?

A. From 6:00 until 12:00, 6:00 a.m. until 12:00 midnight.

Q. Is 12:00 midnight when the terminal closes?

A. Yes, sir.

Q. Was there a change in this procedure which began on June 15th, 1961?

A. No, sir. Me and Mr. Hopkins had discussed about closing the restaurant for repairs and since the time occurred, to keep down any violence, any disturbance that may come from this that we heard about, we decided among ourselves to close the restaurant for those repairs at such time.

Q. You had two reasons then for closing the restaurant?

A. Yes, sir.

[fol. 198] Q. Who is this Mr. Hopkins that you discussed this with?

A. The City Manager.

Q. The City Manager of the City of Tallahassee?

A. That's right, sir.

Q. Did you make any repairs?

A. Yes, sir.

Q. What repairs?

A. Several repairs such as on the refrigeration, conduit, the pipe, just repairs in general.

Q. Did you complete the repairs?

The Court: Excuse me, Mr. Simon. Are you trying to impeach your own witness or what?

Mr. Simon: I am trying to get the information as to why this restaurant was closed. I am not trying to impeach him. I don't know whether the repairs were completed or not.

The Court: You asked him why he closed and he told you. Now you are pinpointing him down as though he is a hostile witness.

Mr. Simon: I don't have any reason to believe that he is a hostile witness.

The Court: Let's hurry along with it and don't pick everything to pieces all day long.

Mr. Simon: I will do my best, Your Honor.

[fol. 199] Q. Did you complete the repairs?

A. As of now I don't think all repairs are done. I mean, the only thing I can say is we closed for repairs. As such time as repairs are made or until Mr. Hopkins and myself think that it is—that no more repairs should be done, then we will open up. Until then I will remain closed.

Q. Apparently, you did complete some of the repairs because you did open on the 17th, did you not?

A. That's right.

Q. And you remained open until when?

A. Yesterday.

Q. You closed down again yesterday?

A. Yes, sir.

Q. Was that done at Mr. Hopkins' request?

A. No, sir. At both of ours.

Q. Both of your agreements?
A. Yes, sir.
Q. Did your New York office instruct you to open up this restaurant?
A. At the beginning on March 29th, 1961?
Q. No, sir. On June 15th or 16th, 1961.
A. No, sir.
Q. They did not?
A. No, sir.
[fol. 200] Q. Isn't it a fact that this restaurant was closed to avoid the necessity of serving an integrated group of Freedom Riders?
A. No, sir.

Mr. Messer: I object to that as a leading question.
The Court: Objection sustained.
Rephrase the question.

Q. Did you bring with you a copy of the lease between the City of Tallahassee and the American News Company dated October 20th, 1960 which is now in effect between the City of Tallahassee and the American News Company for the operation of the restaurants at the Tallahassee Municipal Airport?
A. I did.
Q. Is that the lease you have in your hand?
A. That is the lease.

OFFER IN EVIDENCE

Mr. Simon: If Your Honor please, we would like to introduce it into evidence as Defendants' Exhibit "1".
Mr. Messer: We have no objection.
The Court: So entered and marked.

(Lease dated 10/20/60 referred to was admitted in evidence as Defendants' Exhibit "1".)

Mr. Simon: I have a certified copy, Your Honor, which counsel may feel might be more proper to have and I would [fol. 201] like permission to substitute a certified copy by the City Auditor and Clerk for the City of Tallahassee.
The Court: All right.

Mr. Messer: Is that a photographic copy that has been certified?

Mr. Simon: We got it from the City Clerk and I believe it is a photostat of the original lease.

Mr. Messer: (After examining document) No objection.

The Court: The certified photostat will be introduced.

Q. You do not serve negroes in the white restaurant at the Tallahassee Municipal Airport, do you?

A. No, sir.

Q. Is that a policy which has been directed to you by the City or by your own company?

A. That I can't answer.

Mr. Messer: I object to that question. I think the issue is whether there was discrimination practiced on the dates of June 15th and 16th according to the testimony of the defendants.

The Court: I don't think it is a question of discrimination at any time. It is a charge of unlawful assembly here. Discrimination in bus stations and all I don't think has a [fol. 202] thing to do with it.

Go ahead.

Q. Do you know Mr. Aubrey?

A. No, sir. I know a Mr. Autrey.

Q. Do you know Mr. Autrey?

A. Yes, sir.

Q. Who is he?

A. He is southern division manager for this company, the Union News Company.

Q. Did you have any conversations with him concerning the operation of this restaurant at the terminal?

A. As division manager I called him.

Q. Did he tell you to open the restaurant or to close it?

A. Neither one. I told him I was closed for repairs, period.

Q. Your kitchen remained in operation, did it not?

A. Yes, sir.

Q. You continued to serve people who came into the kitchen?

A. No, sir.

Q. You continued to serve people who boarded planes?

A. Not the people themselves. As an agreement with the airlines as to catering, I did so, that being a different operation altogether from the operation of the restaurant.

[fol. 203] Q. Can you tell us how it was that you were able to open your restaurant during four or five days of that week and then were obliged to close it again?

Mr. Messer: If the Court please, I am going to object to this line of questioning. I think the Court very appropriately pointed out the sole issue in this case was unlawful assembly and counsel is trying to lay the predicate for a civil suit against some operator; if he is trying to do that he can do that by filing a suit. I don't see where it has any place in this court.

The Court: Objection sustained.

Mr. Simon: Read the question back (addressing the Reporter).

(The question referred to was read back by the Reporter.)

The Court: You don't have to answer that.

Q. Can you tell us how you were able to serve persons in the restaurant on Thursday, June 15th at approximately 1:30 in the afternoon although a "Closed" sign was on the door?

A. I closed the restaurant at 1:30. The people that was eating I had to let out. No one after that came in. I was closed, period.

Q. When was the next time that you opened the restaurant?

[fol. 204] A. Saturday morning.

Q. When was the next time you closed the restaurant?

A. Saturday afternoon.

Q. When did you open it again?

The Court: We are getting right back again to the cafe rigmarole. I am ruling now I don't want to hear anything else about the cafe business. I think it is pretty well established it was closed and it was opened after they left and

it was closed again, then it was opened again and I don't care about it.

Mr. Simon: We will proffer—if I can continue to examine this witness it would be clearly established that the pattern of opening and closing matched precisely the movements of these defendants in and out of the State of Florida.

The Court: That would probably be true according to how you felt on this situation.

Mr. Simon: I have no further questions of this witness.

Mr. Messer: No further questions did you say?

Mr. Simon: Of this witness.

Cross examination.

By Mr. Messer:

Q. The City of Tallahassee does not operate the restaurant at the airport, does it?

A. No.

Q. That is operated by the American News Company, is [fol. 205] that correct?

A. That's right.

Mr. Messer: That is all.

The Court: Any reason why he can't be excused?

Mr. Simon: No.

The Court: Did you bring your original copy of the lease?

The Witness: The only copy I have which is not the original.

Mr. Simon: You can have that back because we have a certified copy in evidence.

(Witness excused.)

The Court: The court will take about a two minute recess.

(A short recess was taken.)

The Court: Are all the defendants present or accounted for or are their appearances waived?

Mr. Simon: Yes, sir.

We will call Reverend Arthur Hardge.

OFFER IN EVIDENCE

At this time, if Your Honor please, I would like to offer into evidence Defendants' Exhibit "1-A" for identification which is the statement that was prepared by or for Mr. James Messer. It has previously been identified and I would like to offer it into evidence at this time.

[fol. 206] Mr. Messer: I have no objection on that going into evidence with the understanding that that was the basis for the proclamation and not the entire proclamation or order which I testified to.

The Court: We will admit it for what it contains with the understanding that your testimony elaborating on it was the full statement.

Mr. Messer: Yes.

Mr. Simon: Would you mark this, then, as Defendants' Exhibit "2" in evidence.

(Proclamation previously marked Defendants' Exhibit "1-A" for identification was admitted in evidence as Defendants' Exhibit "2".)

[fol. 207] Thereupon, ARTHUR L. HARDGE, defendant, called as a witness in his own behalf, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Simon:

Q. What is your name, address and occupation?

A. I am Reverend Arthur L. Hardge, 315 Church Street, New Britain, Connecticut. I am a clergyman.

Q. How long have you been engaged in that profession?

A. For 16 years.

Q. Do you have any degrees from any universities?

A. Yes, I do. I have a Bachelor of Arts degree from Morgan State College, Baltimore, Maryland.

Q. Have you had any special training for the profession of clergyman?

A. Yes, I have. I studied at the Temple University School of Theology and I have also taken extension courses at Union Theological Seminary.

Q. What is your denomination?

A. African Methodist Episcopal Zion.

Q. What is your color?

A. I am a negro.

[fol. 208] Q. Did you hear the testimony of the other witnesses regarding the trip of the Freedom Riders?

A. Yes, I did.

Q. Were you a part of that group?

A. Yes, I was.

Q. Were you in the terminal at the Tallahassee Municipal Airport from approximately 1:00 o'clock or 2:00 o'clock on Thursday, June 15th to Friday, June 16th when you were arrested?

A. Yes, I was.

Q. By the way, did you have during this period the opportunity of observing the restaurant, the white restaurant in the terminal?

A. Yes, I did.

Q. Was that closed all during that period?

A. Yes, it was.

Q. Did you see any repairs being conducted in the restaurant during that period?

A. No, sir, I did not.

Mr. Simon: Will you mark this as Defendants' Exhibit "2-A" for identification.

(Roll of film referred to was marked Defendants' Exhibit "2-A" for identification.)

The Court: For the record what is that?

[fol. 209] Mr. Simon: That is, Your Honor, a film of the incidents that occurred at the Tallahassee Municipal Airport on Thursday, June 15th, 1961 at approximately 1:45 p.m.

Mr. Messer: May I ask—apparently, counsel is testifying.

The Court: I was asking him to identify an object that he was placing into evidence for the purposes of identification.

You say around 1:45?

Mr. Simon: Shortly after these people arrived at the terminal.

The Court: On the 15th or the 16th?

Mr. Simon: The 15th of June, 1961.

The Court: You may mark it for identification purposes.

Q. Reverend Hardge, I show you Defendants' Exhibit "2-A" for identification and ask you if you have had the occasion to view that film?

A. Yes, I have.

Q. Is that film a true, correct and accurate portrayal of the events that occurred at the Tallahassee Municipal Airport on Thursday, June 15th, 1961?

A. Yes, it is.

Q. At a time you and the nine other Freedom Riders [fol. 210] arrived at the airport?

A. Yes. I might say that there were several films I viewed. Some were on the 15th and if this is one of those, it is. Others were on the following day.

Mr. Simon: If Your Honor please, I would like to introduce this into evidence and we are prepared to exhibit it to the Court if the Court wants to see it at this time or the Court can view it at a subsequent time.

We offer it into evidence as Defendants' Exhibit "3".

Mr. Messer: If the Court please, before the Court rules on the admissibility of it I would like to cross examine the witness in regard to the film.

The Court: You may question the witness now for the purpose of objecting to the admission into evidence of the film.

Mr. Messer: Did you take the pictures that are supposed to be shown on that film?

The Witness: I didn't get your question.

Mr. Messer: Did you take any moving pictures out at the airport?

The Witness: I took pictures out at the airport but these are not my films.

Mr. Messer: Those are not your film?

The Witness: No, sir.

[fol. 211] Mr. Messer: Who took those pictures?

The Witness: I don't know, sir.

Mr. Messer: How did you come into possession of them?

The Witness: There were shown to me by my attorney, Mr. Dixon.

Mr. Messer: If the Court please, I am going to object to the admissibility in evidence of the films. He didn't take them.

Mr. Simon: Counsel, obviously—

Mr. Messer: They could have been edited, they could have been cut, there could have been omissions.

The Court: What purpose would be served by showing a film taken on the 15th when the arrest was made on the 16th around 12:45?

Mr. Simon: The purpose in this particular instance is to show that the restaurant was closed, that there was a small hand printed sign marked "Closed" and that the restaurant contained a number of people in the restaurant who were eating.

It also shows the condition of the terminal at that time, that there were few people gathered and no crowds.

The Court: I think we have had about six or seven hours of testimony on the same thing and I believe it so why look at it?

[fol. 212] Mr. Simon: Does Your Honor—

OFFERS IN EVIDENCE AND REFUSAL THEREOF

The Court: I am not going to admit it into evidence.

Mr. Simon: We will proffer it into evidence, if Your Honor please.

The Court: All right. It is refused.

Mr. Simon: Would you have this one marked as Defendants' Exhibit "3-A" for identification.

(Roll of film referred to was marked Defendants' Exhibit "3-A" for identification.)

Q. Reverend Hardge, I show you Defendants' Exhibit "3-A" for identification and I ask you if you have had the occasion to view this film.

A. Yes, sir, I have.

Q. Can you tell me whether or not it represents a true, correct and accurate portrayal of the events which took place—

A. Yes, sir.

Q. (Continuing) —at the Tallahassee Municipal Airport on Friday, June 16th, 1961 at approximately 12:00 or 12:30 p.m. at a time when Mr. Messer was reading his proclamation to you and the other nine Freedom Riders?

A. Yes, sir.

Mr. Simon: We offer this into evidence as Defendants' [fol. 213] Exhibit "3".

Mr. Messer: I would like for you to look at these films and tell me which one was taken on Thursday and which one on Friday.

The Witness: I cannot do that. As I said, I saw several rolls and some of them were taken on the 15th, Thursday, and others were taken on the 16th. All of them were taken during the time we were at the Municipal Airport.

Mr. Messer: In other words, you don't know what is on these films here, you can't swear under oath?

The Witness: I know what is on there. It is an accurate picture of what took place on the 15th and 16th at the Municipal Airport.

Mr. Messer: You don't know which film contains each incident?

The Witness: I don't think anyone could tell you that, sir, just seeing a blank roll of film.

The Court: The question is can you under oath now testify within a degree of certainty which reel of those films depicts the 15th and the 16th? If you don't know, it is all right to say so.

The Witness: I know it is all right to say so but I am looking at a blank reel which designates nothing to me.

The Court: You just testified, Preacher, by Mr. Simon [fol. 214] that this film here depicted what happened on the 16th and yet you put the two together and you don't know whether it is the 15th or 16th.

The Witness: I also mentioned before I saw several reels of film, some taken on the 15th and some on the 16th.

Mr. Messer: I am going to object to the introduction into evidence on the same grounds as before. If he is attempting to disclose the fact that the restaurant was closed at the time of the defendants' arrival at the airport and was closed the next day, that has been established by several witnesses. We admit it.

Mr. Simon: I haven't also indicated what is on this second film but I would like to explain to the Court that I am interested in saving the time of this Court. I can take the camera which is here (indicating) and the projection screen which is here and I can run these films and proffer them that way. I am trying to save the time of this Court.

Mr. Messer knows very well you can't pick up a blank reel and see what is on it. This witness and I have gone through these things and he has seen them and we have marked each one, each reel as 1, 2, 3 and 4.

The Court: You pick one up and ask him if the film on here depicts what happened on the 16th, if it was a true reproduction of it and he said, "Yes."

[fol. 215] Mr. Simon: Because he knows the first film shows the events of the 15th and the second film I was going to ask him about shows the events of the 16th.

I would like permission of the Court to get a movie camera and show them to the Court so that this witness can testify from his own direct knowledge.

The Court: Hold on a minute. What is the purpose of showing the film?

Mr. Simon: The purpose of showing the second reel which is Defendants' Exhibit "3-A" for identification is to show that when—it is a pictorial representation of the entire terminal at the time when Mr. Messer was reading from the second exhibit, the proclamation so-called, and it shows the exact condition of the terminal, it shows the number of people that were there in all parts of the terminal at that particular time and there weren't that many to speak of, maybe four or five police officers at the terminal.

Mr. Messer: One of the bases of objection is somebody had to develop those films and edit those films and they could have been deleted and parts added. I want the person who took the pictures to identify them.

The Court: Do the pictures reflect the surrounding area

leading to and from the airport and a time marked on the film as to the exact moment it was taken?

[fol. 216] Mr. Simon: Yes, sir. As a matter of fact, in this film or in some of the films it shows the clocks and in this particular one the time has been already identified because we see Mr. Messer reading the statement.

The Court: I think it would be interesting but I cannot admit it into evidence until the person who took the pictures and developed the pictures can come forth and testify that they are in full as taken.

Mr. Simon: We proffer this as a true and correct and exact portrayal of the events that occurred in the terminal at the time that Mr. Messer was reading his proclamation.

The Court: I cannot admit it into evidence on a proffer. A predicate must be laid first.

Mr. Simon: Would you mark this as Defendants' Exhibit "4-A" for identification.

(Roll of film referred to was marked Defendants' Exhibit "4-A" for identification.)

By Mr. Simon:

Q. I show you Defendants' Exhibit "4-A" for identification, Reel Number 3, and I ask you if you have had the occasion to view this film.

A. Yes, sir.

Q. Is this a true—

Mr. Messer: If the Court please, let the witness answer what it portrays rather than having a leading question.

[fol. 217] The Court: I think the objection is well taken.

Q. Do you recall what this portrays?

A. I can tell you what is on just about each one but what is on each specific one I don't think I could.

Mr. Simon: If Your Honor please, I am going to ask to have the film shown. I am going to ask permission of the Court to show this film to the witness.

The Court: I am not going to allow them to be shown until the person who took them and developed them and had custody of them up until this time has been here and laid the proper predicate.

Mr. Simon: Then I will proffer this Reel Number 3, Defendants' Exhibit "4-A" for identification, into evidence as a true and correct portrayal of the vending machines located in the Tallahassee Municipal Airport showing the sign on the cigarette machine in handwriting "Cigarettes, 60 cents per pack."

Mr. Messer: I submit that is immaterial. As I see it the only issue is whether or not it is a case of unlawful assembly.

The Court: They are not admitted into evidence.

Mr. Simon: Here is Reel Number 4. Mark this as Defendants' Exhibit "5-A" for identification.

(Reel Number 4 referred to was marked Defendants' Exhibit "5-A" for identification.)

[fol. 218] Q. Reverend Hardge, I show you Defendants' Exhibit "5-A" for identification and I ask you if you have had the occasion to view same.

A. Yes, sir.

Q. Is this a true and accurate portrayal of the arrest of Priscilla Stephens on Friday, June 16th, 1961 at about 12:30 or 1:00 o'clock in the afternoon?

A. Yes, sir.

Mr. Simon: If Your Honor please, I would like to have this introduced into evidence as Defendants' Exhibit Number "3".

The Court: Same objection?

Mr. Messer: Same objection.

The Court: Same proffer?

Mr. Simon: Same proffer.

The Court: Same ruling.

Mr. Simon: We will proffer in this instance of this film that this shows the arrest of Priscilla Stephens, shows her being placed in handcuffs and shows at no time did she struggle or resist arrest of the police.

I have no further questions of this witness.

Cross examination.

By Mr. Messer:

Q. As I understand it you are a Christian minister and not a rabbi?

[fol. 219] A. Yes, sir.

Mr. Messer: That is all.

(Witness excused.)

Mr. Simon: We will now call Reverend Robert Brown.

Thereupon, ROBERT MCAFEE BROWN, defendant, called as a witness in his own behalf, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Simon:

Q. Please state your name.

A. Robert McAfee Brown.

Q. Your address and occupation?

A. My address is 606 West 122nd Street, New York City 27, New York. I am an ordained Presbyterian minister teaching theology at Union Theological Seminary in New York City.

Q. Do you hold any degrees?

A. I have a B.A. degree from Amherst College; a B.D. degree from Union Seminary; a PhD. degree from Columbia University and a Honorary D.D. degree from Amherst College.

Q. Are you the author of any books?

[fol. 220] A. I am.

Q. Which ones?

A. I am the author of The Spirit of Protestantism; I am co-author with a Roman Catholic and a Jesuit on a book of Protestant Catholic relations called an American Dialogue; I am the translator of a book from the French by Dietrich called God's Unfolding Purpose; I am the author of a book called The Significance Of The Church and a book

called The Bible Speaks To You and a book entitled T.P. Forsythe: Prophet For Today.

Q. How long have you been active in your profession?

A. I was ordained to the Christian ministry in April of 1945.

Q. Have you been a practicing minister since that time?

A. I served as a Navy Chaplain, served in a church, have taught on two college campuses and am now teaching in a theological seminary.

Q. Did you become one of the Freedom Riders in Washington, D. C. on June 12th, 1961?

A. I did.

Q. Did you remain with this group until following your arrest and the arrest of the others in the group on Friday, June 16th, 1961?

A. Yes, sir, with the exception of the fact that I was not [fol. 221] present on the journey from Washington to Raleigh, North Carolina. I already had a speaking engagement before the New York State Synod. I flew up to fulfill that commitment and then caught a plane from Syracuse and met the group at Raleigh. I was with the group for the rest of the trip.

Q. Did you share the experiences which have been related by the prior witnesses?

A. Yes, with the exception of anything between Washington and Raleigh.

Q. If we were to examine you on the events of those days would your testimony be corroborative of the testimony of the others in your group?

A. It would.

Q. Were you able to observe the restaurant in the Tallahassee Municipal Airport on Friday, June 16th and Thursday, June 15th, 1961?

A. I was able to.

Q. What was its condition? Was it open or closed?

A. The door was locked and there was a hand printed cardboard sign saying "Closed."

Q. Did you see any repairs being done?

A. I saw no repairs being done.

Mr. Simon: We submit him for cross examination.

[fol. 222] Cross examination.

By Mr. Messer:

Q. Did you go in the kitchen of the restaurant?
A. No, sir.
Q. In other words, you could not tell whether there were repairs being made or not?
A. No, sir. I could not see in the kitchen.

Mr. Messer: No further questions.
The Court: Have you ever been anything other than a Presbyterian?
The Witness: No, sir.
The Court: I have no other questions.
Mr. Simon: If Your Honor please, may I recall Reverend Brown for just one question?
The Court: All right.
Mr. Simon: What is your color?
Defendant Brown: White.
Mr. Simon: That is all.

[fol. 223] Thereupon, ARTHUR L. HARDGE, having been previously duly sworn, resumed the stand and testified further on his oath as follows:

Cross examination (Continued).

By Mr. Messer:

Q. Did you make any long distance calls from the Tallahassee Municipal Airport?
A. Yes, sir.
Q. Did you talk to your wife?
A. I am trying to think when I called. I called my wife.
Q. Did you tell her that you were not coming home because you hadn't been arrested as yet?
A. No, sir.
Q. Did you make a statement to her that you had not been arrested yet?

Mr. Simon: If Your Honor please, I object as to what this man may have said to his wife. It is privileged under any circumstances.

I have reason to believe how Mr. Messner got some of these statements and I don't think that we ought to go into that but certainly this communication is privileged.

The Court: It is not necessarily privileged but it is not proper cross examination because no reference was made [fol. 224] on direct examination.

Objection sustained on that basis.

Mr. Messer: No further questions.

Thereupon, RALPH LORD ROY, defendant, called as a witness in his own behalf, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Simon:

Q. Please state your name, address and occupation.

A. Ralph Lord Roy, 448 Central Park West, New York 25; a clergyman.

Q. What denomination?

A. I am pastor of the English speaking congregation of Grace Methodist Church, New York City.

Q. How long have you been a clergyman?

A. Since 1952.

Q. Do you hold any degrees?

A. Yes. I have a B.A. from Swarthmore College in Pennsylvania. I studied theology at Union and I have a [fol. 225] M.A. from Columbia and Union. I have completed residence for a PhD. from Columbia.

Q. Do you presently hold an active pulpit?

A. Yes. I am pastor of the English speaking congregation of Grace Methodist Church.

Q. Are you the author of any books?

A. Yes. I am the author of Apostles of Discord published in 1953 and Communism and the Churches published in 1960.

Q. Did you become one of this group of Freedom Riders in Washington, D. C. on June 12th, 1961 and did you remain with this group through the arrest of the group on Friday, June 16, 1961?

A. Yes, I did.

Q. Did you share all of the experiences that have been related by the previous witnesses who have testified?

A. Yes, I did.

Q. You heard that testimony have you not?

A. Yes, I have.

Q. If we were to inquire of you in the same vein as we inquired of them would your testimony be anything other than corroborative of what has already been said?

A. No, it would not.

Q. Now, then, sir, were you a witness to the arrest of Priscilla Stephens?

[fol. 226] A. No, I was not. I saw her after she was arrested.

Mr. Simon: You may inquire.

Cross examination.

By Mr. Hill:

Q. Were you a member of the group that formulated the plans to make this prearranged trip?

A. No, I was not.

Q. Are you a member of the Congress of Racial Equality?

A. No, I am not.

Q. How many members of this group, and there are nine others, did you personally know prior to this occasion?

A. I knew four members of this group personally.

Q. Do they live in your town or near you?

A. They live in the New York City area. A couple of them live fairly near.

Q. But the others were total strangers to you?

A. Yes, except I knew two or three of them by name, not total strangers. One of them is a rabbi where my brother happens to live.

Mr. Hill: No further questions.

(Witness excused.)

[fol. 227] Thereupon, ISRAEL DRESNER, defendant, called as a witness in his own behalf, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Simon:

Q. State your name, address and occupation.

A. Israel S. Dresner, 78 South Springfield Avenue, Springfield, New Jersey. I am a rabbi.

Q. How long have you been engaged in that occupation?

A. I have served for the last three years as the rabbi of Temple Share Sholom in Springfield, New Jersey.

Q. What is your educational background and do you hold any degrees?

A. Yes. I am a graduate of the University of Chicago. I also have a M.A. from the University of Chicago. I have a BHL and an MHL from the Hebrew University College, Jewish Institute of Religion at which institution I was also ordained a rabbi.

I have also completed my work for a Doctorate at the University of Chicago except for—I do not have my Doctorate as yet but I hope to have it within the year.

Q. What is your color, please?

A. White.

[fol. 228] Q. Did you become one of these Freedom Riders in Washington, D. C. on June 12th, 1961?

A. I did.

Q. Did you journey with this group from Washington, D. C. to Tallahassee, Florida and share the experiences with them that have heretofore been related by the other witnesses?

A. I did.

Q. If I were to inquire of you in the same manner as I have inquired of previous witnesses would your testimony be other than corroborative of the events that took place up to and including the arrest?

A. It would be corroborative of what was described.

Mr. Simon: We submit this witness for cross examination.

Mr. Messer: No questions.

By Mr. Simon:

Q. Did you see the arrest of Priscilla Stephens?
A. Unfortunately not.

Mr. Simon: You may inquire.
Mr. Messer: No questions.

By the Court:

Q. Who buys the train tickets and bus tickets and give you travel expenses on these freedom rides?
A. Part of it, of my expense, was laid out by myself and my congregation through its social action committee is in [fol. 229] the process of trying to raise the remainder of the funds for me.
Q. Is CORE financing any portion of it other than counsel?
A. Yes. CORE has but CORE will be reimbursed by the social action committee of my congregation.

The Court: All right. That's all.

Cross examination.

By Mr. Messer:

Q. As I understand it, the purpose of your trip from Washington to Tallahassee was to test the interstate facilities and so forth with reference to whether or not they were segregated or integrated. Is that correct?
A. That is certainly one of the major functions of our trip.
Q. What was the other function? What other functions were there?
A. I believe that all of us as servants of God wish to identify ourselves with those who are seeking freedom and equal rights in our country.
Q. It was the same thing, I mean it was to test out whether the facilities of interstate commerce were integrated or segregated? You tested those out on the bus and the test was satisfactory to you, is that right?
A. I didn't know what happened before Tallahassee was of interest to this Court.

[fol. 230] The Witness: If Your Honor wishes—

The Court: No.

Q. What I am talking about is when you arrived at the Tallahassee bus station did you seek food there?

A. We did.

Q. Were you served?

A. I was.

Q. You went out to the airport and you found the restaurant closed?

A. That's correct.

Q. Hadn't you completed your test then if the restaurant was closed?

A. In the opinion of the group which remained the airport terminal was a facility in interstate commerce and we were interstate passengers and we wished to be served at that facility.

All I wanted was a cup of coffee, frankly, and had I been served a cup of coffee I am quite certain I would have left very quickly.

Q. But it was closed to everybody, no person was admitted?

A. It was closed to our group.

Q. Your group and did you see anybody else enter?

A. There were people in the restaurant.

Q. I said enter while you were there.

[fol. 231] A. I did not.

Mr. Messer: That is all.

(Witness excused.)

Mr. Simon: Counsel for the City has agreed to stipulate that Reverend Ralph L. Roy is white.

Thereupon, AUSTIN M. WARNER, defendant, called as a witness in his own behalf, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Simon:

Q. Please state your name, your address and your occupation.

A. Austin McRaven Warner. My address is 468 Riverside Drive, New York City. My occupation is minister.

Q. What is the denomination?

A. Disciples of Christ.

Q. Is that a protestant denomination?

A. Yes, sir.

Q. How long have you been engaged in this occupation?

A. I have been ordained since 1950.

[fol. 232] Q. Do you hold an active pulpit at this time?

A. No, I do not.

Q. How are you employed at this time?

A. I am Executive Secretary of the Manhattan Division of the Protestant Council of the City of New York.

Q. Do you have any degrees from any colleges and universities?

A. Yes, I do.

Q. Which ones?

A. I have a Bachelor of Music degree from the American Conservatory of Music in Chicago; a Bachelor of Arts degree from the Texas Christian University in Fort Worth, Texas; a Bachelor of Divinity degree from Brite College of the Bible at Texas Christian University and a Master of Theology degree from Union Theological Seminary, New York City.

Q. Did you join this group of Freedom Riders in Washington, D. C. on June 12th, 1961?

A. Yes, I did.

Q. Did you journey to Tallahassee with them?

A. Yes, I did.

Q. Did you go along with them to the Tallahassee Municipal Airport on the 15th of June and remain there through the 16th of June when you were arrested?

A. Yes, I did.

[fol. 233] Q. If we were to inquire in detail as to the circumstances of those days would your testimony merely be corroborative of what had gone on before?

A. It would.

Q. What is your color?

A. White.

Mr. Simon: I have no further questions.

Cross examination.

By Mr. Hill:

Q. Were you in on the formative stages of this program?

A. I was called by a representative of CORE on Wednesday evening, that would be the 7th of June, and asked if I could help form this group.

Q. I asked you if you were in on the formative stages. You answered as though you came in after it was decided that you would do it. Am I correct?

A. The decision to form a group of this nature was made before I was called.

Q. Did you know any of these people who made the decision to form this group?

A. Yes, I did.

Q. How many of them?

A. (No response.)

Q. Let me ask you this: How many of these other nine [fol. 234] are you personally acquainted with?

A. Four.

Q. The other are strangers to you then?

A. Yes.

Q. Are you a member of the Congress of Racial Equality?

A. No, I am not.

Q. Are they furnishing you money and other expenses for this trip?

A. I am paying all I can. That which I cannot pay is being paid by the Congress of Racial Equality.

Q. At the time of your finding the restaurant facility closed there you did not consider that that was a sufficient test?

A. No, I did not.
Q. You did not?
A. No.
Q. What did you propose to do?
A. To remain there without eating until the restaurant was opened so we could eat.
Q. Suppose it had remained closed for a great long period of time. Would that have made any difference?
A. Our plans had only been made for the immediate future. What we would have done after several days I do not know.

Mr. Hill: I have no further questions.

[fol. 235] By the Court:

Q. What, in your opinion, is the primary purpose of a member of the ministry? What is his primary purpose in life, a preacher following his profession?
A. His primary purpose in life is to witness to the gospel of Christ in both word and deed.
Q. And thereby save people's souls and make Christians out of them, is that right? Isn't that the ultimate purpose of the preacher?
A. That is true.

The Court: Thank you.

Redirect examination.

By Mr. Simon:

Q. Just a moment. Reverend, if you feel that the question and answer between yourself and the Court is not complete or could in some sense not be leading or expressive of your own views, you have a perfect right as a witness in a courtroom to explain your answer.

The Court: He explained it to my satisfaction and that is enough and he knows it.
Mr. Simon: Then I will respectfully, if Your Honor please, proffer into the record any further statement which he feels is necessary to clear up any misunderstanding that his answer may have created. I don't know whether it

has or not but the witness clearly appeared to me to feel, or appear to show he was dissatisfied with the effect that his answer created.

[fol. 236] The Court: All I asked him was "Is that the primary purpose" and he said, "Yes." I see no further reason for discussion on it.

Mr. Simon: I would then proffer into the record any further statement he would want to make to clear up any misunderstanding which may or may not exist.

The Court: The question was asked and the answer has been given and that is adequate.

That is all.

Mr. Simon: Your Honor, I respectfully submit to the Court that as an attorney we have the right to proffer into the record. The Court doesn't have to accept it as evidence but we have the right to proffer at this time or at the close of the proceedings any matters which counsel feel are relevant and material to the cause. Certainly the purpose of clarifying answers is relevant and material.

The Court asked the question. I feel that both question and answer are relevant or else the question wouldn't have been asked.

The Court: An answer was given and, Mr. Simon, this Court enjoys the position a little bit better than a lawyer today because it is I who makes the decision and not the lawyer.

That is all.

Have a seat (addressing the witness).

[fol. 237] (Witness excused.)

Mr. Simon: We respectfully take exception to the action of the Court.

The Court: I gather that.

Mr. Simon: We will now call as our next witness Reverend Robert Stone.

Mr. Messer: If the Court please may I inquire of counsel for the defense if this is corroborative evidence? We are perfectly willing to stipulate that the testimony of the other defendants with regard to their journey down here, the events that took place at the airport, that their testimony would be the same.

I am trying to shorten this and save time, Mr. Simon.

Mr. Simon: I have been checking it, Mr. Messer. The questions and answers that he elicits from these people other than what I had takes an average of two and a half minutes. All I am trying to get them to do is to identify themselves. They are defendants before this Court and I ask them if it is corroborative.

I didn't ask you to stipulate. If you want to, that is perfectly all right.

Mr. Messer: I will be glad to.

Mr. Simon: I still have to have these people identify themselves to the Court.

[fol. 238] Thereupon, ROBERT J. STONE, defendant, called as a witness in his own behalf, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Simon:

Q. Please state your name, address and occupation.

A. Robert J. Stone, 153 East 30th Street, New York. I am a minister.

Q. What denomination?

A. Presbyterian.

Q. How long have you been engaged in that profession?

A. 12 years.

Q. Do you hold any degrees from any colleges and universities?

A. Yes. A Bachelor of Arts from the University of Oklahoma and a Bachelor of Divinity from Union Theological Seminary.

Q. Do you hold an active pulpit at this time?

A. Yes.

Q. Where?

A. In New York. It is the Adams-Parkhurst Memorial Presbyterian Church. I am also director of the church sponsored community center, The Madison Square Church House.

[fol. 239] Q. Did you join this group of Freedom Riders on June 12th, 1961?

A. Yes.

Q. Did you journey with them to Tallahassee and arrive here on June 15th, 1961?

A. Yes.

Q. Did you then go to the Tallahassee Municipal Airport and remain there through the 16th of June, 1961 at which time you were arrested?

A. Yes.

Q. Would your testimony as to the events of these days be merely corroborative of the testimony of the others that have previously testified?

A. Generally yes, but I did have the occasion to look into the kitchen a number of times?

Q. The kitchen of the restaurant?

A. Yes.

Q. Will you tell us when you did examine the kitchen of the restaurant.

A. Thursday, the 15th in the evening, about 6:00 o'clock approximately.

Q. Any other occasion?

A. On Friday morning.

Q. At what time?

[fol. 240] A. Around 9:00 o'clock.

Q. Did you see any repairs being done by any workmen to the kitchen of the restaurant on those occasions?

A. No repairs but I saw some people being served food.

Q. Do you know who they were?

A. Well, it was just on Thursday evening, I saw two or three people being served food; only one I recognized who has been identified to me as the Captain of the detectives who has been in the courtroom today.

Q. Did you see any evidence of repairs being done?

A. No.

Mr. Simon: You may inquire, sir.

Cross examination.

By Mr. Hill:

Q. Have you had any training in the field of engineering or refrigeration?

A. No.

Q. Did you hear the witness who is manager of the restaurant testify that he had some problems in connection with his refrigeration?

A. No, I could not hear his testimony.

Q. If he said that then, you do not know whether or not he was actually in the process of repairing his refrigeration equipment?

A. No, I don't.

[fol. 241] Mr. Hill: No further questions.

The Court: Anything further, Mr. Simon?

Mr. Simon: Yes.

Redirect examination.

By Mr. Simon:

Q. Reverend Stone, what is your color?

A. White.

Mr. Simon: Reverend Warner, what is your color?

Defendant Warner: White.

Mr. Simon: Reverend Wayne C. Hartmire I will call next.

Thereupon, WAYNE C. HARTMIRE, defendant, called as a witness in his own behalf, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Simon:

Q. Please state your name, address and occupation.

A. Wayne C. Hartmire, H-a-r-t-m-i-r-e, Jr. My address is 218 East 104th Street, New York City 29, New York. I am a minister.

Q. What denomination of the ministry?

[fol. 242] A. United Presbyterian Church in the United States of America.

Q. How long have you been engaged in this profession?

A. I was ordained in 1960.

Q. Do you hold an active pulpit at this time?

A. I am a member of the staff of the Church of the Resurrection of the East Harlem Protestant parish.

Q. Is that in New York?

A. That is in New York City, yes, sir.

Q. What is your color?

A. White.

Q. Did you join this group of Freedom Riders on June 12th, 1961?

A. Yes, I did.

Q. Did you journey with them from Washington, D. C. to Tallahassee, Florida?

A. Yes.

Q. Did you on June 15th, 1961 go to the Tallahassee Municipal Airport and remain there with the others in your group through Friday, June 16th, 1961 at which time you were arrested?

A. Yes.

Q. Have you heard the testimony of the other witnesses who are defendants with you?

A. Yes, I have.

[fol. 243] Q. If you were called upon to testify would your testimony be merely corroborative of what they had to say?

A. Yes, sir, except that I might add that I was one of three who were led to believe that the restaurant would be opened for us that afternoon.

Q. Did you have a conversation on Thursday, June 15th, with the manager of the restaurant?

A. Yes, I did.

Q. What did he say to you?

A. He indicated to us that this day was his one cleaning day of the month and that he would be closed until 4:30 in order to clean the restaurant. At that time he expected to open.

Q. Did he say anything else to you concerning the reasons why the restaurant was closed?

A. No, sir, he did not.

Q. What is your educational background? Do you hold any degrees from a university or college?

A. Yes, I do. I am a graduate of the Princeton University with a degree of Bachelor of Science and Civil Engineering and a Bachelor of Divinity from Union Theological Seminary in New York.

Q. Did you have the occasion to observe the arrest of Priscilla Stephens?

A. I observed her being handcuffed and placed in a police [fol. 244] car.

Q. Did you have the occasion to observe when she left the terminal?

A. No, sir, I did not.

Mr. Simon: I have no further questions.

Cross examination.

By Mr. Messer:

Q. What did you say your last name was?

A. Hartmire.

Q. How old are you, Reverend Hartmire?

A. 29.

Q. Where were you born?

A. I was born in Philadelphia, Pennsylvania.

Q. After the airport manager or the restaurant manager told you he expected to open up at 4:30 and you had reservations out on the 3:25 flight why did you remain?

A. We remained in the hope that we could be served at the restaurant.

Q. You were served at the bus station restaurant?

A. I sat at the lunch counter and ate a piece of pie. I, too, had difficulty—

Q. In effect, wasn't the whole purpose of this trip down here by you and your group just purely one of demonstration?

A. No, sir.

[fol. 245] Q. What was it?

A. I think the purpose has been stated clearly by other witnesses.

Q. I want your statement.

A. I will be happy to repeat it. Our primary purposes were two: First of all, as rabbis and Christian clergymen

to witness to our conviction that God cares about all men equally and he cares deeply when their dignity is denied them or destroyed by any system and our desire to stand with them in their battle against segregation which we feel does deny that dignity.

Secondly, that—

Q. Let me interrupt.

You had no problem on the bus trip down?

A. Yes, sir, we did but I am not sure you are interested in the problem prior to Tallahassee.

Q. I mean not here in Tallahassee at the bus terminal, you had no problem there. You walked in and were served?

A. I had no problem in the bus terminal in Tallahassee.

Q. You had a piece of pie and a cup of coffee?

A. A piece of pie. I don't drink coffee.

Q. Didn't you have milk?

A. No. I had nothing to drink.

Q. Then you went to the airport?

A. Yes, sir, we did.

[fol. 246] Q. Then you were hungry again, I guess, and wanted to eat again?

A. I was continually hungry.

Mr. Messer: No further questions.

The Court: Order in the court, please.

Anything further?

Mr. Messer: I have no further questions.

Redirect examination.

By Mr. Simon:

Q. Reverend, I think you started to say that there was a second reason in response to Mr. Messer's question. Would you finish that, please?

A. Our second purpose was to, as an integrated group, travel on an interstate bus line and test those facilities as to their integrated character, those terminal facilities that we confronted.

Mr. Simon: I have no further questions.

Recross examination.

By Mr. Messer:

Q. Who paid your expenses?
A. Pardon?
Q. Who paid your expenses?
A. My expenses are being paid by CORE. The congregation I serve will pay as much as they are able towards these expenses.

Mr. Messer: That is all.

[fol. 247] Redirect examination.

By Mr. Simon:

Q. What is your color?
A. White.

Mr. Simon: Reverend Stone?
Defendant Stone: White.
Mr. Simon: That is all I have of this witness.

(Witness excused.)

The Court: Call your next witness.

Thereupon, PETTY D. MCKINNEY, defendant, called as a witness in his own behalf, having been previously duly sworn, was examined and testified on his oath as follows:

Direct examination.

By Mr. Simon:

Q. Please state your name, address and occupation.
A. Reverend Petty D. McKinney, 75 Wilburham Avenue, Springfield, Massachusetts. I am an American negro and pastor of the Garden Memorial Design Church.
Q. You are a clergyman at the present time?
A. Yes, sir.
[fol. 248] Q. How long have you been engaged in that profession?

A. Since 1948.

Q. Do you hold an active pulpit at the present time?

A. I do, yes.

Q. What church?

A. Garden Memorial.

Q. Is that in Springfield, Massachusetts?

A. Yes.

Q. Do you have any degrees from colleges and universities?

A. Well, I attended New York University and Livingston College and majored in religious education. I am the recipient of a Bachelor of Arts degree and also Hood Theological Seminary with a Bachelor of Divinity degree.

Q. Did you join the Freedom Riders, this group of Freedom Riders, on June 12th, 1961?

A. I did.

Q. In Washington, D. C.?

A. Yes.

Q. You journeyed with them to Tallahassee, Florida?

A. I did.

Q. You arrived here on June 15th, 1961?

A. Yes.

Q. Did you on that date go to the Tallahassee Municipal [fol. 249] Airport?

A. I did.

Q. You remained there with the other defendants through June 16th, 1961 at which time you were arrested?

A. I did, that's correct.

Q. If I were to inquire of you as to the details of these days would your testimony be corroborative of the other witnesses who testified before you?

A. My testimony would be the same as the previous witnesses.

Q. Now, sir, did you have the occasion to observe the arrest of Priscilla Stephens?

A. I did, sir, yes.

Q. Did you have occasion to observe when she left the terminal?

A. Not when she left, I did not.

Q. Do you know—

A. At the time of her arrest I did.

Q. Do you know whether she left before or after you did?

A. She left before because when we came out of the station she wasn't behind us. She was out there on the sidewalk and I went into one of the patrol cars and that is when I found out she was under arrest. I heard an officer say, "Get in the car, Priscilla," and I heard Priscilla say, "You [fol. 250] ordered me to go so I was on my way home."

He put her in handcuffs and put her in the car.

Q. Did she resist the officer in any way?

A. I didn't see her make any demonstration as far as resisting arrest. I did hear her say, "You ordered me to go so I left. I was on my way home."

Mr. Simon: You may inquire.

Cross examination.

By Mr. Hill:

Q. You say you did not see her leave at all?

A. I didn't see her leave.

Q. After you were outside you saw her outside?

A. When we came out she was on the outside, yes.

Mr. Hill: No further questions.

(Witness excused.)

* * * * * * *

[fol. 263] Thereupon, ORVILLE HOPKINS, recalled as a witness by the defendants, having been previously duly sworn, testified further on his oath as follows:

Direct examination.

By Mr. Simon:

Q. Mr. Hopkins, please restate your name.

A. Orville Hopkins.

Q. Mr. Hopkins, you are the City Manager of the City of Tallahassee and you were engaged in this occupation during the week of July 12th, 1961, were you not?

A. Yes, sir.

Q. Did you have the occasion to discuss the closing of

the restaurant at the Tallahassee Municipal Airport with any person or persons during that week?

A. I believe I discussed it with the manager of the res-
[fol. 264] taurant, yes.

Q. Was that in connection with the pending trip of these defendants to this City?

A. Not necessarily, no.

Q. Was it in part?

A. If it was it was a mighty small part. Would you like for me to tell you the conversation I had with the manager of the restaurant?

Q. Yes, sir. I would first like to hear what part the trip of these defendants had with it and then you can explain your answer.

A. I believe it was mentioned in the discussion with the manager of the airport, since he had to close for repairs anyway and since they had had riots in other areas from these bus riders that it might be the best time for him to do his repairs.

In fact, last Thursday the engineers, the City engineers was here from Jacksonville going over some of the cooling system in the restaurant that we had quite a bit of trouble with. In fact, I saw one of them out there when I was out there that time, the FAA inspectors.

Q. So that since there was some repair work that had to be done you felt it might be a good idea to avoid the difficulty that an integrated group would cause?

A. I don't think that played a major part in it whatso-
[fol. 265] ever.

Q. It was a small part?

A. Yes.

Q. Do you recall the date on which it was closed?

A. I believe it was closed last Thursday when I was out there one time. I remember buying a sandwich in one of those machines.

Q. It was closed in the middle of the day, wasn't it?

A. It was when I got there and that was about 2:00 or 3:00 o'clock.

Q. It was open for part of the day and it closed part of the day?

A. If it was open in the morning I don't know. I was there in the afternoon.

Q. Did you have any further conversations with Mr. Isdell about the opening of the restaurant and the subsequent reclosing of it?

A. Not that I can remember, no, sir.

Q. You know that it remained closed during the time that these defendants were sitting out in the terminal?

A. It was closed on Thursday night, I know, because I was there myself.

Q. It was closed on Friday, wasn't it?

A. I believe it was, yes.

[fol. 266] Q. Then when these people left on Saturday it reopened?

A. If it opened I don't know. I wasn't there on Saturday.

Q. How about Sunday and Monday?

A. I believe I had lunch there Monday if I'm not mistaken.

Q. So you know it reopened on Monday?

A. I don't remember. It was one day this week that I had lunch there. I don't know if it was Monday or Tuesday.

Q. You know it is closed today, do you not?

A. I had heard it was closed, yes.

Q. As a matter of fact, didn't you—

A. I haven't been out there, no.

Q. (Continuing) —didn't you and Mr. Isdell discuss the fact it should be closed because these people were coming back?

A. No, sir.

Q. Does the City have a policy directing that the restaurant be closed to avoid integrated eating in the restaurant?

A. I don't think it is a policy, no, sir.

Q. Whose idea was it to put up a white and colored eating facility?

A. Well, it was an agreement between the City and the several restaurant people that we would have just as [fol. 267] good facilities for one as the other.

Q. In your opinion, do you feel that one facility is just as good as the other?

A. They said they would make one facility as good as the other.

Q. But they didn't did they?

A. If it is not as good I believe they would make it as good.

Q. Is it as good?

A. In comparison to the volume of traveling public through there I would say yes.

Q. The white dining room is all glassed in, is it not?

A. That is very true.

Q. The colored area is not?

A. That is very true.

Q. The white dining room has chairs and tables?

A. Very true.

Q. They have none in the colored area?

A. That is right.

Q. In the colored area all they have are little stools you sit at a counter on?

A. That's right, and I believe that he had discussed in case it was needed, if it showed the need for it, they would be willing to put the tables in the colored section too.

[fol. 268] Q. Under no circumstances would they have the white and colored eating in the same area?

A. State your question again.

Q. Was it also agreed that they would under no circumstances have the white and colored eating in the same area?

A. Very true.

Q. As City Manager you do not have any direct management or control over the question of peace and safety or police protection, do you?

A. I have all the control over the police protection in the City of Tallahassee.

Q. Do the police act under your jurisdiction?

A. Yes, sir.

Q. Is the Chief of Police in this town an elected official or is he appointed by you?

A. He is appointed by the City Manager.

Q. He is your appointee?

A. Yes, sir.

Q. He acts under your direction and control?

A. Yes, sir.

Q. Do the records of your office contain any building

permits reflecting the repairs down at the Tallahassee Municipal Airport during the two days that the Freedom Riders were sitting out there?

[fol. 269] A. No, sir.

Q. What is that?

A. No, sir, not that I know of. I could check the Building Inspection Department and determine that. I haven't gone through the records.

Q. There was no conversation between you and the manager of the restaurant about his taking out a work permit before he closed the place in the middle of the day?

A. There was no construction that he knew of, any adding on or any major repairs that require a permit anyway.

The question was of small repairs to motors in the cooling system mostly I believe it was.

Q. Was that the air conditioning or the refrigeration?

A. No, sir, it was the refrigeration.

Q. The refrigeration apparently continued to work because they continued to serve meals to airliners, didn't they?

A. Yes. It was some other repairs. What it was I don't know. I believe he had a clean-up job. He discussed that he wanted to do that with me, too.

Q. That was mopping?

A. Yes, sir.

Q. That took how long?

A. I don't know.

Q. This is the first time the restaurant has been closed [fol. 270] to your knowledge?

A. To my knowledge, yes, sir.

Q. You don't actually have anything to do in your capacity of City Manager with the operation of this restaurant, do you?

A. Not as far as the actual operation of it, no.

Q. If the manager of the Savarin chain was to be replaced that wouldn't come through your office, would it?

A. No, sir.

Q. You don't have anything to do with the operation or control of the restaurant?

A. No, sir, not that type.

Q. I'm sorry?

A. Not that type, no.

Q. So that when you and Mr. Isdell discussed the closing of the restaurant the discussion about repairs had nothing to do with the work of your office?

A. I don't believe I understand that exactly.

Q. I mean, you don't have anything to do with the repairs in the restaurant, do you?

A. No, sir. They pay for that themselves.

Q. That's right, and consequently the discussion about repairs, they didn't have to come to you in order to do the repairs, did they?

[fol. 271] A. Not as far as repairs are concerned, no.

Q. The City wasn't going to pay for it?

A. No, sir.

Q. Did you call Mr. Isdell or did he call you?

A. I don't remember. In fact, I think I was out there eating lunch and we discussed it. I believe that is the way it was.

Q. That is the time that you all decided that it would be a good idea to close the restaurant down to avoid some difficulty?

A. No. It was—it was the idea to close the restaurant down for repairs and a cleaning up. There was a discussion and since he had to do it we thought it was an opportune time to do it in the face of riots in these other areas.

Q. What is that?

A. Where these bus riders had been in other areas that they had riots and it might happen here. Since it had to be closed down it would be a good time to do it.

Q. Do you think that if you had exhibited your influence with Mr. Isdell that he would have kept this restaurant open?

A. I just don't know.

Q. Didn't you and the City officials co-operate with the Greyhound Bus Company to see that there was an integrated eating pattern established at the Greyhound bus terminal?

A. I never had a discussion with any bus or Greyhound [fol. 272] people as far as integrating the counters are concerned.

Q. Isn't that something that you as a City Manager

of Tallahassee were interested in achieving for the purpose of avoiding trouble?

A. We are interested in safety and the protection of everybody.

Q. Do you know whether the outfit that runs the restaurant out there is the same, that is the Union News Company? Is that the same as the American News Company?

A. I don't know.

Q. Do you know who operates the restaurant out at the air terminal?

A. Mr. Isdell is the manager of it.

Mr. Messer: If the Court please, counsel for the defense without objection from the City introduced in evidence a copy of the lease, a certified copy of the lease between the American News Company and the City of Tallahassee which speaks for itself. I see no need to go on with this line of questioning.

Mr. Simon: I think you are absolutely right, Mr. Messer. I will withdraw that question and we have no further questions.

The Court: Any questions?

Mr. Messer: No questions.

(Witness excused.)

[fol. 273] Mr. Dixon: I would like to recall Reverend Hartmire, please.

Thereupon, WAYNE C. HARTMIRE, defendant, having been previously duly sworn, was recalled to the stand and testified further on his oath as follows:

Direct examination.

By Mr. Dixon:

Q. Reverend Hartmire, on Saturday, June 17th, did you have occasion to be in the lobby of the terminal?

A. Yes, sir, I did.

Q. Did you have occasion to look through the glass wall into the restaurant area at that time?

A. Yes, I did.

Q. What did you see on that occasion?

A. On Saturday, June 17th, on our way to catch a National Airlines flight I noticed that there were several tables full and customers eating at these tables in the restaurant.

Q. Did you at that time attempt to go into the restaurant?

A. I did not.

Q. Do you know if the restaurant was open to any of you or your associates?

[fol. 274] A. The restaurant had the "Closed" sign on the door and I believe that one of the group tried the door and it was locked.

Mr. Dixon: Your witness.

Cross examination.

By Mr. Messer:

Q. Reverend Hartmire, isn't it quite customary for restaurants to have a closing time?

A. Yes, sir, it is.

Q. Actually, the fact that people were eating in there wouldn't mean that they were continuing to be open for business, would it? In other words, they would have to let people in there finish?

A. That's true, sir.

Q. What time was it that you arrived at the airport on Saturday afternoon?

A. It was about 2:30 in the afternoon.

Q. After the usual noon meal hour?

A. I would agree, yes, sir.

Mr. Messer: That is all.

(Witness excused.)

DEFENSE RESTS

Mr. Simon: The defense rests.

* * * * * * *

[fol. 278] RULING OF THE COURT

The Court: You defendants have been arraigned and entered pleas of not guilty. After hearing all of the evidence and duly considering the same the Court finds you, Israel Dresner, guilty as charged and the sentence of the law and the judgment of the Court is for your said offense you paid a fine of $500.00 or serve 60 days in the City Jail.

Austin Warner, on your plea of not guilty the Court finds you guilty as charged and it is the sentence of the law and the judgment of the Court that you pay a fine of $500.00 or serve 60 days in the City Jail.

Robert McAfee Brown, the Court finds you guilty as charged and it is the sentence of the law and the judgment of the Court you pay a fine of $500.00 and in default of said fine you be confined in the City Jail for a period of 60 days.

Petty D. McKinney, the Court finds you guilty as charged. It is the sentence of the law and the judgment of the Court you pay a fine of $500.00 and in default of said fine you be confined in the City Jail for a period of 60 days.

Martin Freedman, on your plea of not guilty the Court after hearing the evidence and considering the same finds you guilty of same. It is the sentence of the law and the judgment of the Court you pay a fine of $500.00 and in default of said fine you be confined in the City Jail for a period of 60 days.

[fol. 279] Arthur L. Hardge, the Court finds you guilty as charged. It is the sentence of the law and the judgment of the Court you pay a fine of $500.00 or in default of the $500.00 you serve 60 days in the City Jail.

Robert John Stone, on your plea of not guilty the Court finds you guilty as charged and it is the sentence of the law and the judgment of the Court you pay a fine of $500.00 or serve 60 days in the City Jail.

Wayne C. Hartmire, the Court finds you guilty as charged and it is the sentence of the law and the judgment of the Court you pay a fine of $500.00 or serve 60 days in the City Jail.

J. W. Collier, Jr., the Court finds you guilty as charged and it is the sentence of the Court you pay a fine of $500.00 and in default of said fine that you be confined in the City Jail for a period of 60 days.

Charles A. Hunter, nol. prossed.

Ralph Lord Roy, on your plea of not guilty the Court finds you guilty as charged and it is the sentence of the law and the judgment of the Court you pay a fine of $500.00 and in default of said fine you be confined in the City Jail for a period of 60 days.

Gentlemen, it is not my business to lecture but I want to assure you that if I thought for one minute or if the facts in this case supported the thought for one minute that you [fol. 280] all came here on a noble, Christian purpose and had acted accordingly when instructed to vacate and leave that you would not be here. I am not attempting to change your minds about anything that you think but I wish that you would stop and think this: When you do get back home to your respective cities that you would check the criminal rates and the prostitution rates and the racial strife as compared as to what you find in Tallahassee and then when you have cleaned up your own bailiwick or whatever it is, then we would welcome your suggestions.

Until that time I think you have more than you can do at home. You came here for the sole purpose of forcing your opinions and your views on this community. No matter how noble your reasoning sounds to you or how you have testified in this court it all boils down simply to that fact. You all have traveled a thousand miles in order to be deprived of something that you had at home already and then you get all of the United States embroiled in something.

That is the basis of this ruling, that you came here lawfully, you were protected thoroughly and completely over a long period of time, many many hours, much to the neglect of the other 50,000 or 75,000 people in this County and this City and your continued lawful assembly became unlawful when the temper of the community reached the point that it did and the proclamation was read to you. I am sure your attorneys can explain that to you but [fol. 281] somehow I feel you aren't interested in it at all anyway.

Have a seat.

* * * * * * *

[fol. 299]

DEFENDANTS' EXHIBIT "1A" FOR IDENTIFICATION AND ADMITTED IN EVIDENCE AS DEFENDANTS' EXHIBIT "2"

(Letterhead of the City of Tallahassee, Florida.)

My name is James Messer, Jr. I am City Attorney and a special police officer of the City of Tallahassee.

I am advised that your assembly here will tend to create a disturbance or incite a riot or disorderly conduct within the City of Tallahassee, therefore, as a special police officer of the City of Tallahassee and in the name of the State of Florida and the City of Tallahassee, I command all of you who are here assembled immediately and peaceably to disperse. If you do not immediately and peaceably disperse, I shall arrest you, or cause you to be arrested, for unlawful assembly.

[fol. 300]

ATTACHMENT TO TRANSCRIPT

IN THE MUNICIPAL COURT

IN AND FOR THE CITY OF TALLAHASSEE

A MUNICIPAL CORPORATION OF FLORIDA

Case Nos. 77900-77912

CITY OF TALLAHASSEE, Plaintiff,

vs.

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. MCKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY, CHAS. A. HUNTER, JOHN J. POLAND, JR., and PRISCILLA G. STEPHENS, Defendants.

Stipulation

It Is Hereby Stipulated between Counsel for the above named, and in the above-styled causes, that the Talla-

hassee Municipal Airport in Leon County, Florida, is on property owned by the City of Tallahassee, and said Airport is operated by the City of Tallahassee, and was on June 15th and 16th, 1961, so operated and on such property, which is without the corporate limits of said City.

Edw. J. Hill, Counsel for Plaintiff, the City of Tallahassee, Florida.

[fol. 301] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 302]

IN THE MUNICIPAL COURT

IN AND FOR THE CITY OF TALLAHASSEE

A MUNICIPAL CORPORATION OF FLORIDA

Case Nos. 77900-77912

CITY OF TALLAHASSEE, Plaintiff,

—VS.—

ISRAEL DRESNER, et al., Defendants.

ASSIGNMENTS OF ERROR—Filed July 19, 1961

The Defendants, by their undersigned counsel, assert the following as assignments of error to be relied upon in the within appeal:

1. The Court erred in entering its judgment against the Defendants for the reason that the statute pursuant to which the Defendants were arrested and which the Defendants are charged with having violated, namely, F.S. Chapter 61—is invalid and unconstitutional and violates the rights of the Defendants under the Florida and Federal Constitutions and denies to them the due process of law and the equal protection of laws and consequently, the Defendants were unlawfully and illegally arrested and the charges placed against them were without foundation.

2. The Court erred in entering its judgment against the Defendants for the further reason that the said arrests and charges constitute a denial to the Defendants of the equal protection of the law under the Fourteenth Amendment to the Federal Constitution; a denial of due process of law guaranteed thereby; a denial of the privileges and immunities of state citizenship guaranteed thereby; and a [fol. 303] denial of the privileges and immunities of Federal citizenship since the Defendants were deprived of restaurant facilities in the Tallahassee Municipal Airport owned and operated as an instrumentality of the City of Tallahassee, by reason of their color or association with persons of color, and the said facilities were not made available to them without regard to their race or color.

3. The Court erred in entering its judgment against the Defendants for the reason that the Defendants were passengers in interstate commerce awaiting departure of their plane from Tallahassee to points outside the state of Florida, and consequently, the racially discriminatory arrests and prosecutions brought against the Defendants, constitute a violation of their rights of unfettered travel free of racial discrimination under the Interstate Commerce Clause of the Federal Constitution (Article 1, Section 8, Clause 3), a violation of their privileges and immunities of Federal citizenship, a violation of the Federal Aviation Laws, and a violation of the Federal Aviation Act of 1958, and in particular, Section 404 of said Act (72 Stat. 760; 49 U.S.C.A., Section 1374 (b)).

4. The Court erred in entering judgment against the Defendants for the reason that the arrests of the Defendant and their prosecutions in view of the evidence constitutes a violation of their liberty of contract as guaranteed by the Fourteenth Amendment to the Federal Constitution.

5. The Court erred in entering its judgment against the Defendants for the reason that the acts of the city officials in arresting and prosecuting the Defendants who constituted a party of negroes and persons in association with negroes and who were peaceable, quiet and dignified at

all times, constitute patent racial discrimination by a muni-
[fol. 304] pality in violation of the due process clause and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

6. The Court erred in entering its judgment against the Defendants for the reason that the same was contrary to the weight of the evidence.

7. The Court erred in entering its judgment against the Defendants for the reason that the same was contrary to law.

8. The Court erred in entering its judgment against the Defendants for the reason that the arrests of the Defendants and their subsequent trial and conviction by the Municipal Court in and for the City of Tallahassee constituted racial discrimination against the Defendants by reason solely of their color or association with persons of color in violation of the obligations placed upon the states by the Fourteenth Amendment to the Constitution of the United States not to discriminate against any person or persons solely by reason of their color or association with persons of color.

9. The Court erred in entering its judgment against the Defendants for the reason that the arrests of the Defendants by peace officers and public officials of the City of Tallahassee and the Defendants' subsequent trial and conviction in and by the Municipal Court in and for the City of Tallahassee, constituted state aid of racial discrimination against the Defendants by reason solely of their color or association with persons of color by a lessee-restauranteur (at the airport) of the City of Tallahassee, in violation of the obligations placed upon the states by the Fourteenth Amendment to the Constitution of the United States not to discriminate against any person or persons solely by reason of their color or association with persons of color, and also in violation of the Federal Aviation Act of 1958 and [fol. 305] in particular, Section 404 of said Act (72 Stat. 760; 49 U.S.C.A., Section 1374 (b)), and in further violation of the obligations placed upon the City of Tallahassee,

a Florida Municipal Corporation, by the provisions of F. S. 332.08 (3).

Tobias Simon, Howard W. Dixon, and Robert J. Ramer, Attorneys for Defendants, 706 Ainsley Building, Miami 32, Florida, By: Tobias Simon, Of Counsel.

[File endorsement omitted]

[fol. 306] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 307] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ISRAEL DRESNER, et al., Appellants,

v.

CITY OF TALLAHASSEE, Appellee.

STIPULATION TO SUPPLEMENT RECORD-ON-APPEAL—
Filed October 30, 1961

Counsel for the Appellants and Counsel for the Appellee hereby stipulate that the Record-on-Appeal in this cause be supplemented by including therein the texts of Ordinance #851 and Sec. 23-5, and Sec. 23-38 of the 1957 City of Tallahassee Code, which provides as follows:

"Sec. 23-5 Any person or persons who shall stand, congregate or assemble upon any of the sidewalks or corners of the streets, or in, around or about the parks or other public places or buildings in this city to the annoyance of or hindrance to the passers-by, shall be liable to arrest, and it shall be the duty of the chief of police or any other officer of the police force under his direction, to order all persons violating this section to move away or disperse and in case of neglect or refusal to obey such order, to arrest or cause to be

arrested the person so refusing or neglecting to obey, and take him or them before the municipal court for trial."

"Ord. #851—Sec. 1 If any person or persons, whether armed or not, are unlawfully, riotously or tumultuously assembled within the City of Tallahassee, the Mayor, any city commissioner or any police officer or member of the Police Department of the City of Tallahassee, whether such member be a regular or special police officer appointed for temporary service, when in the opinion of the said Mayor, commissioner or police officer or member of the Police Department of the City of Tallahassee, whether such member be a regular or special police officer appointed for temporary service, the assembly of such persons shall tend to create a disturbance or incite a riot or disorderly conduct with- [fol. 308] in said City, the Mayor, any city commissioner or any police officer or member of the police Department of the City of Tallahassee, whether such member be a regular or special police officer appointed for temporary service, shall go among the persons so assembled, or as near to them as may be with safety, and shall in the name of the State of Florida and the City of Tallahassee command all the persons so assembled immediately and peaceably to disperse, and if such persons so commanded do not thereupon immediately and peaceably disperse, the city officers hereinabove named shall command the assistance of all persons in seizing, arresting and securing such persons in custody; and if any person present being so commanded to aid and assist in seizing and securing such person or persons refusing to obey such command, or in suppressing a riot or unlawful assembly, refuses or neglects to obey such command, or when required by the officers authorized by this ordinance to issue such command, to depart from the place, refuses and neglects to do so, he shall be deemed one of the persons unlawfully assembled and shall be prosecuted and punished as hereinafter provided by this ordinance.

Sec. 2. Any person refusing to obey the command to disperse as provided under the terms of this ordinance shall be deemed guilty of disorderly conduct and shall be subject to the penalties of this ordinance as hereinabove provided.

Sec. 3. Any person violating any of the provisions of this ordinance shall upon conviction thereof be punished by a fine not exceeding Five Hundred Dollars ($500.00) or imprisonment not exceeding sixty (60) days, or by both such fine and imprisonment. Each and every violation of any provisions of this ordinance shall constitute a separate offense.

Sec. 4. This ordinance shall take effect as provided by the charter act of the City.

"Sec. 23-38 It shall be unlawful for any person to commit, within the corporate limits of the city, any act which is or shall be recognized by the laws of the state as a misdemeanor, and the commission of any such acts is hereby forbidden.

"Whosoever shall violate the provisions of this section, upon conviction thereof, shall be punished by the same penalty as is therefor provided by the laws of the state, but in no case shall such penalty exceed [fol. 309] a fine of five hundred dollars, or an imprisonment for more than sixty days, or both such fine and imprisonment in the discretion of the municipal judge."

Dated this 26 day of October, 1961.

Alfred I. Hopkins, Counsel for Appellants, 707 Ainsley Building, Miami, Florida, Alfred I. Hopkins.

James Messer, Jr. & Edw. J. Hill, Counsel for Appellee, 216 East Jefferson Street, Tallahassee, Florida, James Messer, Jr., Edw. J. Hill.

[fol. 310] Clerk's Certificate to the foregoing paper (omitted in printing).

[fol. 311]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

July Term, A. D. 1961

Case No. 31,121

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. MCKINNEY, MARTIN FREEDMAN, ROBERT J. STONE, ARTHUR L. HARDGE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH LORD ROY, Appellants,

vs.

CITY OF TALLAHASSEE, Appellee.

An Appeal from the Municipal Court, in and for the City of Tallahassee, John A. Rudd, Judge.

Tobias Simon, Alfred I. Hopkins and Howard W. Dixon, for Appellants.

James Messer, Jr., City Attorney, and Edward J. Hill, City Solicitor, for Appellee.

OPINION—Filed November 1, 1961

THORNAL, J.

We have for consideration a motion to dismiss a direct appeal from the Municipal Court of the City of Tallahassee.

We must decide whether this Court has jurisdiction to consider the appeal.

The City charged that the appellants did "unlawfully assemble . . . contrary to the laws and ordinances of said City in such cases made and provided, and against the peace and dignity of the said City of Tallahassee, Florida." A trial in the municipal court culminated in a finding of guilt and a sentence to pay a fine with an alternative term in the [fol. 312] city jail. At the outset of the trial the appellants moved to dismiss the complaint with the contention that Section 870.04, Florida Statutes, as amended by Chapter 61-237, Laws of Florida, 1961, was being invalidly applied against

them. The City Judge announced that "the statute is not unconstitutional on its face." Coming here directly from the municipal court appellants contend that the trial judge passed directly on the validity of a state statute and that we, therefore, have jurisdiction pursuant to Section 4, Article V, Florida Constitution. The appellee's motion to dismiss questions the jurisdiction of this Court to determine the matter on a direct appeal. This motion has been argued and is now here for disposition.

The appellants were charged with the violation of the municipal ordinances of the City of Tallahassee. Nowhere in the complaint were they charged with a violation of a state statute. A reference to Section 870.04, supra, as amended, will reveal that the statute condemns a riotous assembly and provides a penalty under Section 870.02, Florida Statutes. The offense described in the statute is a misdemeanor triable in the state courts. The statute does not even impliedly define a municipal offense. This distinction is important in determining our jurisdiction. It is perfectly clear that the municipal judge was not confronted by the necessity of passing directly on the validity of a state statute. The most that could be said would be that he was called upon to pass upon the validity of a municipal ordinance. In actuality, the record indicates that he was merely requested to decide that "the statute" was invalid "as applied to the appellants." The real contention asserted before the trial judge questioned the application of the statute, rather than its fundamental validity.

This Court derives its appellate jurisdiction from Article V, Florida Constitution. By Section 4(2), Article V, supra, appeals from trial courts may be taken directly to this Court from certain specified types of judgments. Among these are "final judgments or decrees directly passing upon the validity of a state statute . . . or construing a controlling provision of the Florida or federal constitution . . . " We [fol. 313] must look to this constitutional provision as the source of our jurisdiction to entertain the instant appeal.

It is clear that the trial judge, at most, was called upon to pass upon the validity of a municipal ordinance. This is so because the appellants were charged with a violation of the municipal ordinances, rather than with a violation of a

state statute. We have long ago held under Section 4(2), Article V, supra, that this Court did not have the power to entertain a direct appeal from a judgment of a trial court which merely passes upon the validity of a municipal ordinance. For purposes of determining the jurisdiction of this Court, a municipal ordinance cannot be classified as a "state statute." Armstrong et al. v. City of Tampa, Fla., 1958, 106 So. 2d 407. While conceivably a municipal court could be considered as a "trial court" from which a direct appeal could come here if in some peculiar situation the municipal court passed directly upon the validity of a state statute, such is not and could not have been the instant situation. Boyd v. County of Dade, Fla., 1960, 123 So. 2d 323. Moreover, even though the appellants attempted to question the validity of the application of the cited statute, they did not in any fashion assault the fundamental validity of the statute itself. Jurisdiction comes to us by direct appeal when the validity of the statute is assaulted and passed upon. When the problem involves the validity of the application of an otherwise valid statute, a direct appeal here is not available unless there be a final judgment or decree which construes a controlling provision of the State or federal constitutions. Stein v. Darby, et al., opinion filed October 11, 1961. In the instant case there was certainly no such construction. The final judgment of the municipal judge merely contained a finding of guilt and the assessment of the fine. Nowhere in the record is there a construction of the constitution. Armstrong v. City of Tampa, supra.

Although ordinarily motions of the type involved here would be disposed of without opinion, we deemed it appropriate to elaborate on our reasons for the future guidance of the Bar.

[fol. 314] Finding as we do that this Court is without jurisdiction to hear the instant appeals, the motion to dismiss is well-taken. However, we will treat the motion as a motion to transfer an appeal improvidently lodged in this Court. Rule 2.1a (5)(d), Florida Appellate Rules. Under Section 6, Article V, Florida Constitution, the circuit courts have jurisdiction to hear appeals from municipal courts when they involve questions such as those presented here. It is, therefore, ordered that within five days from the

filing of this opinion all papers, records, briefs and other documents, including the notice of appeal, be and the same are hereby transferred to the Circuit Court, Second Judicial Circuit for appropriate disposition. Our opinion is not to be construed as in any fashion passing upon the merits of the appeal or the sufficiency of the record, including the notice of appeal. These are matters to be disposed of by the circuit court in the exercise of its appellate jurisdiction.

It is so ordered.

Roberts, C.J., Hobson, Drew and O'Connell, JJ., concur.

[fol. 315] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 316] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE STATE OF FLORIDA

SECOND JUDICIAL CIRCUIT

IN AND FOR LEON COUNTY

At Law

No. 10084

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. MCKINNEY, MARTIN FREEDMAN, ROBERT J. STONE, ARTHUR L. HARDGE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH LORD ROY, Appellants,

vs.

CITY OF TALLAHASSEE, Appellee.

ORDER AFFIRMING JUDGMENT—Entered August 16, 1962

This is an appeal from convictions in the Municipal Court of the City of Tallahassee, Florida of the ten appellants named in the caption who were charged with unlawful assembly. A fine was assessed against each of them with an alternate jail sentence.

The formal charge is in a single count naming the ten appellants and three others* as defendants and alleges an unlawful assembly on June 16, 1961 "in that, they being more than three (3) persons, met together to commit a breach of the peace, acting together and concertedly to occupy and continuously occupy certain chairs and seating facilities in the Tallahassee Municipal Airport, making and cancelling group airline reservations on the two (2) operating airline schedules departing Tallahassee on said date, and on June 15, 1961, and meeting together in concert attendant with circumstances calculated to excite alarm, endanger the public peace and excite fear, and in such nature as to inspire well-grounded fear in persons of reasonable courage, of riot, or other breaches of public peace, and while so unlawfully assembled" were commanded by a [fol. 317] police officer of the city, after identifying himself as such, to immediately and peaceably disperse, and they refused or neglected to do so.

The appellants contend that the judgments pursuant to convictions violate their rights guaranteed by the Florida and United States Constitutions in that they have been denied the equal protection of the laws and have been deprived of liberty or property without due process of law. They contend that the state statute, Chap. 61-237, Laws of 1961, (F. S. 870.04), (which, by reference adoption in a municipal ordinance,** is made an ordinance of the City of Tallahassee) is unconstitutional and void, either on its face or as it has been applied to the appellants in this case.

The pertinent portions of the statute, adopted as an ordinance, are:

> "If any number of persons . . . are unlawfully, riotously or tumultuously assembled in any . . . city or municipality . . . any . . . police officer of said city or municipality . . . shall go among the persons so as-

---

* Of these three one was acquitted and the other two were granted a nolle prosequi.

** Sec. 23-38, Tallahassee Code, provides that it shall be unlawful for any person to commit any act which is or shall be recognized by the laws of the state as a misdemeanor. The penalty is a maximum fine of $500.00 or 60 days imprisonment or both.

> sembled . . . and shall, in the name of the state command all the persons so assembled immediately and peaceably to disperse; and if such persons do not thereupon immediately and peaceably disperse, said [officer] shall command the assistance of all persons in seizing, arresting and securing such persons in custody; and if any person present . . . when required by such [officer] to depart from the place, refuses or neglects to do so, he shall be deemed one of . . . the persons unlawfully assembled and may be prosecuted and punished accordingly."

The facts in the case are not in dispute and squarely present the question as to whether or not the conduct of the appellants was an exercise by them of rights they hold under state and federal constitutional provisions, which would preclude their prosecution, conviction and sentence for unlawful assembly in the trial court.

[fol. 318] The appellants are clergymen, two being rabbis and the others being ordained ministers of several Protestant denominations. They are residents of New Jersey, New York, Massachusetts or Connecticut. Some of them are of the white race and some are negroes. About June 12 or 13, 1961 they, together with eight other clergymen from the same general area, departed from Washington, D. C. by interstate common carrier bus for a so-called "Freedom Ride" into Virginia, the Carolinas, Georgia, and Florida. The bus ride terminated in Tallahassee June 15, 1961. The "Freedom Riders" left their buses at the Greyhound bus terminal there and went into the terminal lunch room to obtain food which was served them.

This trip was sponsored and at least partially financed by an organization known as C O R E (Congress on Racial Equality) which has been aggressive in promoting racial integration and desegregation. The trip was well publicized, having been given wide coverage in all news media including radio and television. The time and place of arrival in Tallahassee was heralded and well known.

The purposes of the "Freedom Ride", as stated by appellant Collier, who was the spokesman for the group, were two-fold: (1) To ascertain whether or not there were

facilities available on an integrated basis to interstate passengers in waiting rooms, in rest rooms, in eating facilities in the terminals through which they would pass; and (2) To bear witness as ministers, rabbis and clergymen to the struggle to obtain those rights "guaranteed us by the Constitution."

Shortly prior to the time the buses bearing the "Freedom Riders" were scheduled to arrive at about noon on June 15, there had gathered in the vicinity of the bus station a [fol. 319] number of persons and groups of persons. Law enforcement officers, including city police, had been dispatched to the area to prevent any disturbance. It was suspected that resentment against the "Freedom Riders" might result in some attempts at violence toward them or precipitate other disorders. When the buses arrived, law enforcement personnel moved in and gave protection to the passengers as they left the bus and entered the lunch room in the terminal. Apparently they were served in the lunch room under circumstances and policies satisfactory to them.

In approximately an hour after arrival at the bus terminal the eighteen "Freedom Riders" proceeded to the Tallahassee Municipal Airport ostensibly for the purpose of boarding a 3:25 P. M. Eastern Air Lines plane for passage to Washington, Newark, or New York. They were transported to the airport in private cars presumably furnished by local sympathizers with their objectives.

Upon arrival at the airport they found that the restaurant there had been closed. When the time approached for arrival of the 3:25 plane the ten appellants cancelled the reservation they had previously made for the flight. The other eight boarded the plane when it arrived and departed for their destinations in the East.

At that time, the airport arrangement provided separate waiting rooms, or areas, for white and negro; also separate rest rooms; and separate areas for serving food, the white area being a glassed-in place and the negro consisting of a counter with several stools. However, as mentioned before, the eating service had been discontinued by the closing of the restaurant facilities. A sandwich vending machine was in the lobby, but the prices on same had been marked up from previous prices.

[fol. 320] The appellants stayed together in a more or less compact group in the lobby area most of the time and no attempt was made to enforce separation of the races in the waiting room. Rest rooms were used by them without observing the designation of the segregated facilities.

After cancelling their reservations for the 3:25 P. M. flight they sought and ultimately obtained reservations for a flight the next morning at 8:25 on an E. A. L. plane. They remained in the airport until about 11:00 P. M. that evening for the purpose of observing if the restaurant would open and service be granted to them. The restaurant remained closed.

Law enforcement officers, including city police, were detailed to keep order. The activities and objectives of the appellants had been the subject of news reporting and groups of people were seen to be gathering or attempting to gather in the vicinity of the airport. There were critical and hostile comments made about the appellants. The police turned away some of those gathering when it was apparent such persons had no airport business or interest. Persons were even screened at the entrance and turned away by officers if they had no business to transact at the airport.

The chief of police advised the appellants that the airport terminal would close for the night at approximately 11:45 P. M. and a spokesman for appellants requested protection as they moved from the airport into the city and also on the return to the airport the next morning. Such protection by escort of law enforcement officers was provided.

The appellants thus left the airport at about 11:00 P. M. on the 15th to return the next morning prior to the scheduled departure at 8:25 A. M. of the plane on which they had obtained reservations. They were given escort security pro- [fol. 321] tection on both the occasions of leaving and returning to the terminal.

The restaurant was also closed on the morning of June 16. At 8:15 A. M. all ten of the appellants cancelled their reservations for the 8:25 flight and remained in the waiting room after that flight had departed. At 8:20 A. M. they sought, and ultimately obtained, reservations on a National

Airlines flight scheduled to depart at 1:47 P. M. that day, but cancelled just prior to noon.

During these periods there continued to be movements and gatherings of groups of people in cars and there was a hostility and open resentment against the conduct and attitudes of the appellants. A considerable number of police, sheriff's deputies and highway patrolmen had been detailed to prevent disorder. City, county and state officials, including the Governor, were apprehensive and moved to provide necessary law enforcement personnel to preserve order.

At about 12:15 P. M., Mr. James Messer, Jr., city attorney of Tallahassee and a special police officer of the city, after conferring with the mayor and chief of police of the city, approached the appellants who were together and inquired if there was a leader of the group. Appellant Collier arose and identified himself and assumed to act as spokesman. Mr. Messer identified himself and his official positions, exhibiting his police badge. Others in the group gathered around Mr. Messer and Rev. Collier and Mr. Messer read to them a proclamation. He stated that the assembly of the appellants at the Municipal Airport of Tallahassee will tend to create a disturbance or incite a riot or disorderly conduct within the City of Tallahassee at its Municipal Airport over which the city had jurisdiction. He mentioned incidents of the previous night and fears of more unrest. [fol. 322] He then commanded them in the name of the state and city to immediately and peaceably disperse, and explained that such meant from the airport property. He then added that failure to so disperse would result in arrest for unlawful assembly. Collier asserted that they were interstate passengers, to which Messer replied that he did not consider them to be bona fide passengers in view of their reservation cancellations.

Several local sympathizers with the appellants dispersed, but appellants failed to do so. After about 1½ minutes, Mr. Messer turned to the Chief of Police and remarked "Chief, you can carry out your orders." The appellants were arrested and taken into custody.

The appellants take the view that the segregation practices with regard to waiting rooms, rest room facilities, and restaurant or eating facilities at the airport were viola-

tive of constitutional guarantees of equal protection of the law. They would also inject into the case the installation of sandwich and cigarette machines, at or just prior to their arrival, which inflated the prices of merchandise vended to double what it had been. The closing of the restaurant on the day of their arrival and its opening shortly after their departure is viewed as an important factor.

These facts are, in the view of this Court, not at all significant in the legal problems involved in the charge against the appellants and the disposition of such charge by the trial court.

The municipality of Tallahassee operates in a proprietary capacity and in a governmental capacity. Among its proprietary functions is the ownership and operation of a municipal airport and supervision over the concessions [fol. 323] there. Assuming, but not deciding, that its policies of segregation of the races in its facilities are unlawful and did constitute a violation of some duty to the appellants if enforced against them, and further assuming, without deciding, that the closing of the restaurant under the circumstances violated some duty to them, do such circumstances justify a concerted protest demonstration by appellants of their views and convictions over a protracted period of time during which tensions and tempers rise in the community which threaten to erupt into disorder and thus render the city, in its governmental capacity, powerless to terminate the demonstration in the exercise of its police power?

Stated another way, may not a lawful assembly for the purpose of protesting and demonstrating opposition to a course of policy practiced by the municipality become an unlawful assembly when pursued to unreasonable lengths imposing unreasonable burdens on others, after the lawful objectives of the demonstration had been fairly accomplished?

It is fundamental that our constitutions accord to the citizen of the United States the right of freedom of speech and of assembly and to peaceably petition for a redress of grievances. Such freedoms are jealously guarded and when exercised in good faith and in good order may not be lawfully interfered with by governmental action. However,

it is not a license to take into one's own hands the enforcement of law or by excessive harassment, effect coercion and acceptance of one's convictions and interpretations of legal rights by governmental entities whose policies are in conflict. Such procedures wholly ignore the very machinery provided by the constitutions and laws of the nation and state for the declaring, securing and enforcement of [fol. 324] constitutional and other legal rights. It is the courts, both state and federal, to whom resort is readily available for citizens to seek recognition and enforcement of legal rights and immunities. That such courts may not move as swiftly as the individual would wish does not authorize pursuit of personal means which unnecessarily create or threaten public disturbance or disorder, or which substantially interfere with normal, orderly functions of a public facility.

Such a procedure is a form of anarchy which, if it becomes an accepted practice, can have only the effect of seriously weakening orderly government.

The appellants, prior to the reading of the riot act to them, had achieved their announced objectives. They had observed both at the bus station and the airport the integration or lack of it of the waiting room, rest room and restaurant facilities. They had very effectively borne witness as clergymen and otherwise of their sympathy with the struggle to obtain desegregation of the various facilities of interstate travel.

To accommodate and facilitate those legitimate objectives the law enforcement agencies of city, county and state had given protection against potential violence or other disorder from groups or individuals who resented the activities of the appellants. This protection was afforded at the bus station, at the airport on the afternoon of June 15, on the evening of June 15 when the appellants left the airport to come into town and on the following morning when they returned to the airport purportedly to take an early plane. However, instead of using the reservations they had obtained they made a cancellation. This was thrice they had made last minute cancellations of reservations for the sole reason that they wished to eat in the restaurant, which was [fol. 325] closed. In the meantime their conduct and per-

sistence was arousing increased resentment and anger in the community with threats of violence and disorder toward the appellants.

Obviously, the conduct of appellants had revealed a pattern. They would make reservations for travel, wait in the lobby until just before the plane they were scheduled to take arrived and then cancel, make reservations on a later flight and then again cancel at the last minute, at all times remaining in the airport but never taking a plane. The effect is obvious. The seats and other facilities are occupied by them and their use denied to those who actually wished to travel. The use of rest rooms and wash rooms by them partakes more of lodging than a comfort feature for those whose sole purpose is some airport business. The reservation of space and last minutes cancellations prevented the use of that space of the flights involved, resulting in loss and inconvenience to the air line involved and probable denial to other would-be travelers of the use of that space. The sole purpose of such a course of harassment was to goad the municipality and its restaurant lessee to open the restaurant and gratify the appellants' wishes that they be served in the style and manner they deemed to be their right.

Controversies between citizens and governmental units are not unique. In nearly every instance there is a conflict in what the citizen contends he has a right to claim and the governmental entity which would deny the validity of such claim. The citizen may freely express his views and seek to cultivate converts to them with a view of bringing moral or political pressures on the officers of the public body to accord his demands. However, such means must [fol. 326] be exercised in a manner that is reasonable and not harmful to the rights of others or the peace and good order of the community. Especially is this true when the controversy is one of public interest in which there are strong and emotional feelings on the part of a substantial number of persons in the community.

The courts, both state and federal, are open to resolve controversies on constitutional issues in duly instituted and processed civil actions. Indeed, the very issue in the demonstrations of the appellants was subsequently pre-

sented to and adjudicated by the United States District Court for the Northern District of Florida. Brooks, et al. v. Tallahassee, 202 Fed. Supp. 56. When citizens press their demonstrations in behalf of a cause (however worthy they deem their objectives to be) beyond the bounds of fully and effectively delivering their message and reach the stage that they materially and harmfully interfere with the orderly business and lawful activities of others, who are acting in public or private capacities, then the conduct is disorderly and assembly for carrying it out is unlawful. Such was the case here.

The judgments appealed from are hereby affirmed.

Affirmed.

Ben C. Willis, Circuit Judge

[fol. 327] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 328]

SUPREME COURT OF THE UNITED STATES

No. 585—October Term, 1962

ISRAEL DRESNER, et al., Petitioners,

vs.

CITY OF TALLAHASSEE.

ORDER ALLOWING CERTIORARI—April 15, 1963.

The petition herein for a writ of certiorari to the Circuit Court of the State of Florida, Second Judicial Circuit is granted. Counsel are directed to brief and argue, in addition to the merits, the question of whether the judgment is supported by adequate state grounds.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

NO. 35

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY,

Petitioners,

vs.

CITY OF TALLAHASSEE,

Respondent.

RESPONDENT'S BRIEF ON QUESTION OF JURISDICTION

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

NO. 35

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY,

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RESPONDENT'S BRIEF ON QUESTION OF JURISDICTION

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INTRODUCTION

This Brief is filed pursuant to instructions to counsel by Chief Justice Warren during the course of oral argument in this cause.

JURISDICTION

The jurisdiction of this Court is sought to be invoked by the Petitioners under 28 USCA, Section 1257, under Petition for Writ of Certiorari, and under which the first clause of said section reads as follows:

> "Final judgments or decrees rendered by the *highest court of a state in which a decision could be had* may be reviewed by the Supreme Court as follows: . . ."

QUESTION

WAS THE ORDER AFFIRMING JUDGMENTS ENTERED BY THE CIRCUIT COURT OF LEON COUNTY, FLORIDA, AFFIRMING CONVICTIONS IN THE MUNICIPAL COURT OF THE CITY OF TALLAHASSEE A FINAL JUDGMENT RENDERED BY THE HIGHEST COURT OF FLORIDA IN WHICH A DECISION COULD BE HAD UNDER THE LAW OF FLORIDA WITHIN THE PURVIEW OF 28 USCA, SECTION 1257?

Respondent respectfully urges this question be answered in the negative.

STATEMENT OF THE CASE

These Petitioners were tried, found guilty, and sentenced in the Municipal Court of the City of Tallahassee for unlawful assembly. (R.144) Petitioners sought to appeal this conviction directly to the Florida Supreme Court. On Motion To Dismiss, the matter was remanded to the Circuit Court of the Second

Judicial Circuit for Leon County, in which the municipality of Tallahassee is located. (R.153-156) Thereafter, the Circuit Judge entered an Order Affirming Judgment on August 16, 1962. Nothing else transpired until a Petition for Certiorari, Brief of Petitioner, and certain portions of the Record were field with the Clerk of the District Court of Appeal, First District, State of Florida, on October 16, 1962, which was on the sixty-first day after the entry of the Order of the Circuit Judge. This abortive effort at filing the Petition for Certiorari in the appropriate District Court of Appeal was unaccompanied by the necessary filing fee, and consequently, although received, never formally filed in the office of the Clerk. These items were returned to Mr. Tobias Simon pursuant to his request, all as more fully appears from Appendix E to the Respondent's Brief in Opposition to the Petition for Writ of Certiorari heretofore filed in this cause.

Petitioners now seek to have this matter reviewed by the United States Supreme Court on certiorari.

ARGUMENT

It seems without question that in Florida, a Circuit Court's appellate decision in a case appealed from a Municipal Court may be reviewed by certiorari in a District Court of Appeal. The Circuit Courts of the state are the proper appellate forums for the various Municipal Courts; this is clearly spelled out in both the state Constitution and in certain supplementing Statutes. Article V, §6 (3), of the Florida Constitution reads in part: ". . . The Circuit Courts . . . shall have final appellate jurisdiction . . . of all cases arising in municipal courts . . .".

The Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, which affirmed the judgments in these cases, is the primary trial court in Florida and has final appellate jurisdiction of all cases arising in Municipal Courts and no ap-

pellate proceedings lie in such cases from the Circuit Courts; but the Supreme Court and the District Courts of Appeal have express power to issue writs of certiorari which is a common law writ which issues in the sound judicial discretion of the Court to an inferior court, not to take the place of an appeal, but to cause the *entire record* of the inferior court to be brought up by certified copy for inspection in order that the superior court may determine from the face of the record whether the inferior court has exceeded its jurisdiction; or has not proceeded according to the essential requirements of the law in cases where no direct appellate proceedings are provided by law. *Davis et al vs. Strople (Fla. 1949)*, 39 So.2d 468; also *Malone vs. The City of Quincy*, 66 Fla. 52, 62 So. 922, wherein certiorari is referred to in the following terms:

> "Certiorari is a common-law writ, which issues in the sound judicial discretion of the court to an inferior court, not to take the place of a writ of error or an appeal, but to cause the *entire record* of the inferior court to be brought up by certified copy for inspection, in order that the superior court may determine from the face of the record whether the inferior court has exceeded its jurisdiction, or has not proceeded according to the essential requirements of the law, in cases where no direct appellate proceedings are provided by law. *Seaboard Air Line Ry. v. Ray*, 52 Fla. 634, 42 South. 714; *Jacksonville T & K W. Ry. Co. v. Boy*, 34 Fla. 389, 16 South. 2.90; *Hunt v. City of Jacksonville*, 34 Fla. 504, 16 South. 398, 43 Am. St. Rep. 214."

This reference preceded our current judiciary Article V of the Florida Constitution creating the District Courts of Appeal. The District Courts of Appeal succeeded to much of the old jurisdiction of the Florida Supreme Court. Article V, § 5 (3) reads:

"DISTRICT COURTS OF APPEAL . . . (3) Jurisdiction.

> Appeals from trial courts in each appellate district . . . may be taken to the court of appeal of such district . . . except those from which appeals may be taken direct . . . to a circuit court . . . *A district court of appeal may issue writs of certiorari* . . . and also all writs necessary or proper to the complete exercise of its jurisdiction" (this is recognized by Rule 2.2, F.A.R.).

This succession to jurisdiction by Florida's District Courts of Appeal was fully recognized by the Florida Supreme Court in a unanimous decision in *Robinson vs. State* (*Fla. 1961*), 132 So.2d 3, wherein the Court said:

> "By the same token this Court no longer has extensive power to issue so-called 'common law writs of certiorari' to review judgments of lower courts. This power is now vested in District Courts of Appeal and Circuit Courts, by Article V, Sections 5 and 6, Florida Constitution. In situations in which review of a judgment or decree of a lower court is not otherwise provided for, the District Courts of Appeal are endowed with powers of review limited to a determination of whether the judgment constitutes a deviation from the essential requirements of the law. In a general way, this is the type of so-called common-law certiorari power exercised by this Court prior to the effective date of amended Article V, on July 1, 1957. . . . Our holding simply is that a judgment of a circuit court properly sitting in the exercise of its appellate jurisdiction is subject to review by petition for certiorari, not here, but in the appropriate District Court of Appeal.
>
> * * * * * * * * * *
>
> "In the instant situation, as pointed out above, we are not authorized to review directly the decisions of a circuit court sitting as an appellate court. As an incident to the disposition of the matter, however, we have pointed out the constitutional impediments similarly applicable to the ap-

> pellate jurisdiction of circuit courts in reviewing judgments of other trial courts which pass upon the validity of statutes. Under our constitutional system a district court of appeal is the only court which is authorized to issue a so-called common-law writ of certiorari in this instance. In so doing, that court may then properly consider the proposition that the circuit court, in the exercise of its appellate jurisdiction, in the instant case exceeded its constitutional power and, therefore, deviated from the essential requirements of the law. Any judgment rendered by the court of appeal may then be tendered to us for review under those provisions of Article V, Section 4, Florida Constitution, which authorizes us to review decisions of courts of appeal."

In that Petitioners included as an Appendix in their original Brief seeking certiorari the opinion entitled "*Israel Dresner et als, Appellants, v. City of Tallahassee, Appellee*" (Fla. 1961) 134 So.2d 228, without setting forth any reason for its inclusion, it seems appropriate to comment on the procedures involved in order that this Court not be left with the impression that this cause has proceeded appropriately to the highest Court in the state of Florida. In that proceeding directly from the Municipal Court of the City of Tallahassee, Petitioners sought to lodge this case in the Florida Supreme Court in 1961. They there contended that the trial judge had passed directly on the validity of a state statute, and sought to invoke the appellate jurisdiction of the Florida Supreme Court. The Florida Supreme Court held such an assignment to be erroneous, and treated the City's Motion To Dismiss the Appeal in the Supreme Court as a Motion To Transfer an Appeal improvidently invoked pursuant to Rule 2.1 (A) (5) (d) F.A.R. (Rule included in Appendix B of Respondent's Brief in Opposition to Petition for Writ of Certiorari.) The Florida Supreme Court, in referring the same to the Circuit Court, stated:

> "Our opinion is not to be construed in any fashion passing upon the merits of the appeal or the sufficiency of the record, including the Notice of Appeal. These are matters to be disposed of by the Circuit Court in the exercise of its appellate jurisdiction." 134 So.2d 228, 230

Petitioners can not circumvent the review of the District Court of Appeal of Florida, First District, and the Florida Supreme Court by improvidently lodging their cause in the highest court of a state, and, when transferred to the proper court having jurisdiction, claim that the cause has already been there for review.

Under its system of District Courts of Appeal, Florida is divided into three Districts. Each of these District Courts has recognized their rights to grant certiorari to a Circuit Court where such Circuit Court sat exercising final appellate jurisdiction of a lower Court's decision under the Florida Constitution. See: First District: *State vs. Smith* (Fla. 1960), 118 So.2d 792; Second District; *King vs. State* (Fla. 1961) 134 So.2d 502; Third District: *State vs. Katz* (Fla. 1959), 108 So.2d 60; *Campbell vs. County of Dade* (Fla. 1959) 113 So.2d 708; *City of Miami vs. Berman* (Fla. 1961) 129 So.2d 445.

The Court's attention is respectfully called to a scholarly consideration of the status of certiorari in Florida in a specially concurring Opinion by retired Justice Hobson, joined by a majority of the Court in *King vs. State* (Fla. 1962) 143 So.2d 458.

Therefore, the conclusion is inescapable that Petitioners here did not, in fact, seek review by certiorari to the United States Supreme Court from a final judgment rendered by the highest Court in Florida in which a decision could be had.

The untimely effort by Petitioners in lodging a Petition for Writ of Certiorari in the appropriate District Court does not constitute basis for this Court to consider this cause, because the District Court of Appeal at that point was without jurisdiction to entertain the late application pursuant both to Florida Appellate Rules and the appropriate case law. The Petitioners had slept on their rights, if any there were. *Harris vs. Condermann* (*Fla. 1959*) 113 So.2d 235.

If there is a discretionary review available by a higher court within the state system, this Court has repeatedly held that the exercise of such discretion must be invoked. *Fisher vs. Perkins* (*Fisher vs. Carrico*) (*Kty. 1887*), 122 U. S. 522; *Mullin vs. Western Union Beef Company* (*Colo. 1899*) 173 U. S. 116; *Stratton vs. Stratton* (*Ohio 1915*), 239 U. S. 55; *Matthews vs. Huwe* (*Ohio 1925*), 269 U. S. 262; *McMaster vs. Gould* (*N.Y. 1928*) 276 U. S. 284; See annotation at 7 L.Ed. 593.

As pointed out by Respondent in its Brief in Opposition to Petition for Writ of Certiorari (pages 6, 7) this is the third attempt in so-called "civil rights cases" to by-pass the highest court of Florida in which a decision could be had, and to have the United States Supreme Court grant certiorari to the Circuit Court of the Second Judicial Circuit of Florida. The other two Petitions for Writ of Certiorari were denied, presumably on the grounds urged by Respondent in this instance. See No. 783, *Speed vs. City of Tallahassee*, 356 U.S. 913, 2 L.Ed. 2d 586, 78 S.Ct. 670, March 17, 1958, Petition for Writ of Certiorari to the Circuit Court of Florida, Second Judicial Circuit, denied; and No. 671, *Steele vs. City of Tallahassee* and *Armstrong vs. City of Tallahassee*, 365 U. S. 834, 81 S. Ct. 748, 5 L. Ed. 2d 745, March 6, 1961, Petition for Writ of Certiorari to the Circuit Court of Florida, Second Judicial Circuit, denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petitioners did not exhaust their state remedies, and, therefore, this Court has no jurisdiction, the judgment being supported by adequate state grounds.

Respectfully submitted

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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on Question of Jurisdiction has, pursuant to Rule 33 (1) of the Rule of the Supreme Court of the United States, been served by air mail upon TOBIAS SIMON, HOWARD W. DIXON and ALFRED I. HOPKINS, 223 Southeast First Street, Miami, Florida and CARL RACHLIN, 280 Broadway, New York, New York, Attorneys for Petitioners this ..... day of November, A. D. 1963.

ROY T. RHODES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 35

ISRAEL DRESNER, AUSTIN M. WARNER,
ROBERT M. BROWN, PETTY D. McKINNEY,
MARTIN FREEDMAN, ARTHUR L. HARDGE,
ROBERT J. STONE, WAYNE C. HARTMIRE,
J. W. COLLIER, JR., RALPH L. ROY,

Petitioners,

v.

CITY OF TALLAHASSEE,

Respondent.

SUPPLEMENTAL MEMORANDUM OF LAW

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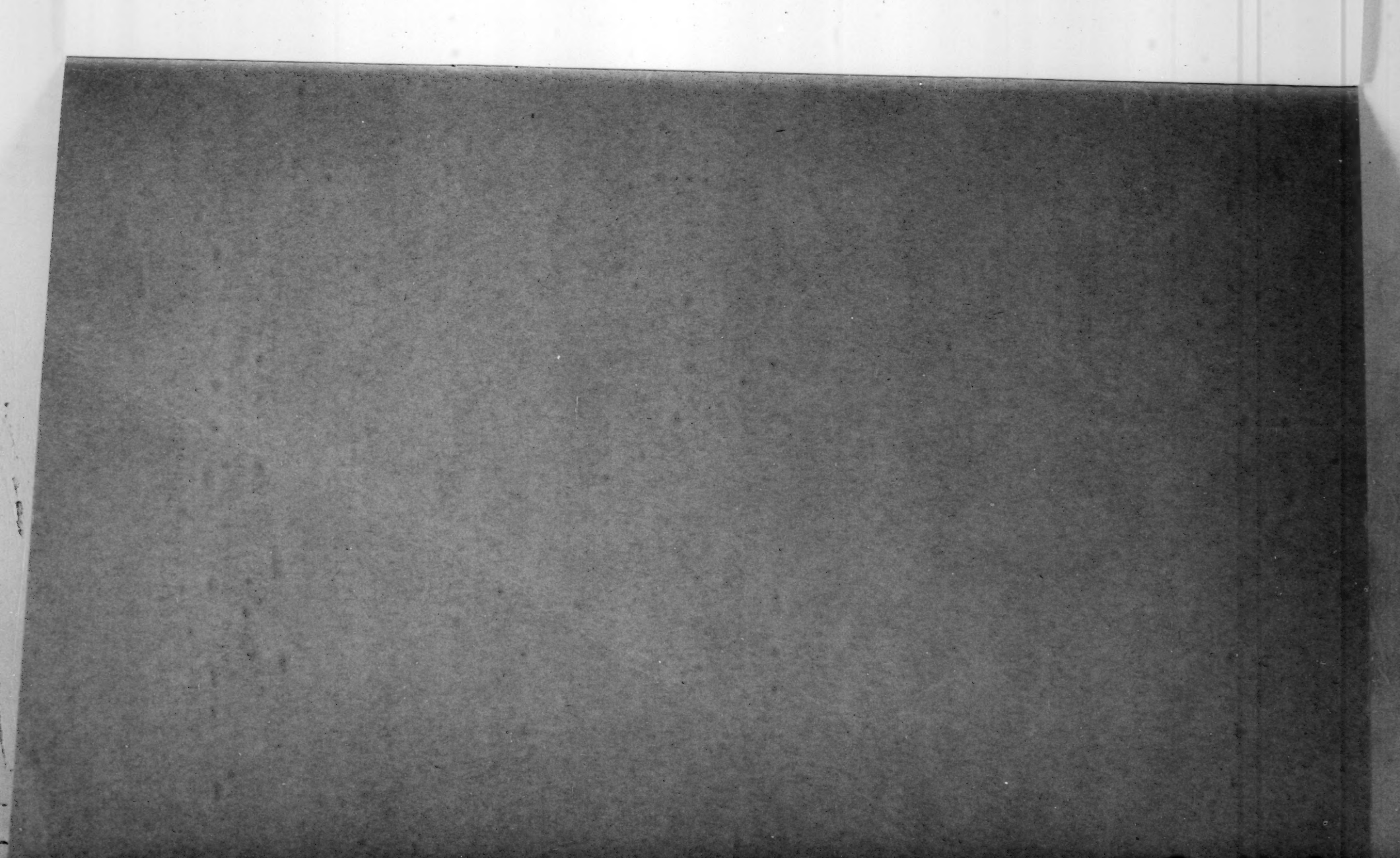


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IN THE

SUPREME COURT OF THE UNITED STATES

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No. 35

ISRAEL DRESNER, AUSTIN M. WARNER,
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ROBERT J. STONE, WAYNE C. HARTMIRE,
J. W. COLLIER, JR., RALPH L. ROY,

Petitioners,

v.

CITY OF TALLAHASSEE,

Respondent.

SUPPLEMENTAL MEMORANDUM OF LAW

In accordance with instructions given and leave granted by the Court during oral argument of this cause, Petitioners respectfully submit the within Supplemental Memorandum of Law on the question of whether there was available to them an adequate remedy in the Florida courts.

1. Article V of the Florida Constitution, insofar as it is germane to this cause, provides for a judicial hierachy

comprising the Supreme Court of Florida, the District Courts of Appeal, the Circuit Courts and the Municipal Courts. Article V, § 6(3) confers upon the Circuit Courts "final appellate jurisdiction . . . of all cases arising in municipal courts." There is no other provision of Florida law allowing any further appeal from such an appellate judgment of a Circuit Court. The only mode of further review of any such final appellate judgment of a Circuit Court is the limited review under so-called common law certiorari. It is important at the outset, therefore, to distinguish this kind of certiorari jurisdiction from all of the other kinds of certiorari and appellate jurisdiction exercisable within the Florida appellate system.

Article V, § 5(3) establishes the jurisdiction of the District Courts of Appeal. These courts are intermediate appellate courts, vested with general appellate jurisdiction, and were established pursuant to constitutional amendment adopted in 1956. Concurrently therewith, the jurisdiction of the Supreme Court of Florida, as set forth in Article V, § 4(2), was radically limited. Article V, § 5(3), which provides for the general appellate jurisdiction of the District Courts of Appeal, also authorizes such courts to issue writs of certiorari, but does not define the scope of such writs, and this definition must be gleaned from the case law which is discussed at length below.

Article V, § 4(2) vests the Supreme Court with a specially defined certiorari jurisdiction, viz.:

> "The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district

> court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law."

Obviously, the case at bar is not embraced within any of the foregoing classifications. In addition, § 4(2) vests the Supreme Court with jurisdiction to "review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court." Article V, § 4(2) also vests the Supreme Court with jurisdiction to entertain appeals from District Courts of Appeal in certain limited cricumstances, namely, appeals "from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution." Again, none of the foregoing categories of certiorari or appeal jurisdiction are applicable to the instant case.

Proceedings styled certiorari are also available in Florida under limited circumstances for the purpose of supplementing a deficient record and, in certain extraordinary cases, for reviewing interlocutory orders in actions at law. See *Kilgore* v. *Bird*, 6 So.2d 541 (Fla., 1942).

In addition, Article V, § 6(3) vests the Circuit Courts with certiorari jurisdiction, and this is utilized, for example, in reviewing the orders of administrative agencies. See, for example, Florida Statutes §§ 176.16 and 176.17. Circuit Courts are also empowered to submit certified questions to the District Courts of Appeal under Rule 4.6

of the Florida Appellate Rules (31 Florida Statutes Annotated, Pocket Part, p. 129); however, nothing contained in that Rule, or in its predecessor, Rule 27 of the earlier Florida Supreme Court Rules, (31 Florida Statutes Annotated, p. 511), specifies that such certification is a condition precedent to the finality of a Circuit Court's appellate judgment. "The Rules make it clear that the certification is to be effected by the judge of the Circuit Court — not counsel. It is the judge's prerogative to decide whether he is to (1) rule upon the unique question himself, or (2) certify it." 9 Miami L.Q. 375, 382 (1955).

It is clear, therefore, that the only kind of appellate review that is available in Florida today with respect to a final appellate judgment of a Circuit Court exercising appellate jurisdiction over an inferior court, is so-called common law certiorari, and which, although provided for by the Florida Constitution, is nowhere defined therein. Jurisdiction to exercise this limited form of review over such final appellate judgments of the Circuit Courts is vested by Article V, § 5(3) in the District Courts of Appeal, and this supervisory jurisdiction under the present Florida Constitution is vested solely in the District Courts of Appeal. Thus, in *Robinson* v. *State*, 132 So.2d 3, 5 (Fla., 1961) the Supreme Court of Florida held that:

> " . . . this Court no longer has extensive power to issue so-called 'common law writs of certiorari' to review judgments of lower courts. This power is now vested in District Courts of Appeal and Circuit Courts by Article V, Sections 5 and 6, Florida Constitution. In situations in which review of a judgment or decree of a lower court is not otherwise provided for, the District Courts

> of Appeal are endowed with powers of review limited to a determination of whether the judgment constitutes a deviation from the essential requirements of the law. In a general way, this is the type of so-called common-law certiorari power exercised by this Court prior to the effective date of amended Article V, on July 1, 1957."

Likewise, in *Ramagli Realty Co.* v. *Craver*, 121 So.2d 648, 651 (Fla., 1960) the Florida Supreme Court stated that:

> "Amended Article V of the Constitution limits the power of the Supreme Court to issue writs of certiorari to the district courts in certain matters and to commissions established by law. The Supreme Court no longer possesses the power to issue so called 'common law writs of certiorari.' Such writs may be issued only by the district and circuit courts." (Fn. 9)

2. The writ of common law certiorari in Florida is one "which issues on *discretion* and not as a writ of right." (Emphasis supplied) *Brinson* v. *Tharin*, 127 So. 313, 316 (Fla., 1930). That being so, Petitioners therefore submit that under the rule announced by this Court in *Teamsters Union* v. *Lucas Floor Co.*, 369 U.S. 95; 7 L.Ed.2d 593; 82 S.Ct. 571 (1962), they were not required by 28 U.S.C. § 1257 to seek any further *discretionary* review in the Florida Courts as a predicate for filing their Petition with this Court. Petitioners further point out, however, that not even the limited *discretionary* power of the District Court was exerciseable in the instant case, and for the reasons set forth below.

3. The burden of Petitioners' initial Reply Brief filed in February of 1963 and addressed to the certiorari jurisdiction of this Court, was to show: (1) That common law certiorari in Florida directed to a final judgment of the Circuit Court is a limited mode of appellate review and is limited to a determination of whether the Circuit Court acted without jurisdiction or in violation of the essential requirements of law, and (2) that under the decisions of this Court, the availability of *full and complete* appellate review on all issues by the state tribunal below is the essential requirement in determining whether the state judgment below is final within the meaning of 28 U.S.C. § 1257. Since there is no issue as to the jurisdiction of the Tallahassee Municipal Court or the Circuit Court for Leon County in the premises, the only question remaining for discussion is the meaning of the phrase "the essential requirements of law". Petitioners understand this phrase to refer simply to matters of procedure. The oft-repeated statement in the Florida cases is that this phrase refers to procedural irregularities and does not embrace a further review of the substantive merits of a case. Thus, in *American National Bank of Jacksonville* v. *Marks Lumber & Hardware Co.*, 45 So.2d 336, 337 (Fla., 1950), the Supreme Court of Florida stated:

> "Here no contention is made of a want of jurisdiction in either of the lower courts. Was there an *illegality of procedure?* Bear in mind that to justify the issuance of certiorari the announced rule refers to *illegality of procedure*, not an erroneous proceeding. In determining whether there exists a departure in the essential requirements of law we ascertain whether the court proceeded consistent with the basic principles of

> law relating to the *procedure* to guide to an ultimate determination of the cause.
>
> * * * *
>
> "If peradventure it appears to some that the error was of sufficient magnitude as to cause a miscarriage of justice, it will still not justify the issuance of the writ to have a further review because that would pit the judgment of the Supreme Court against that of the Circuit Court. The Constitution never contemplated or provided for that. In this class of cases we are concerned with the *character* of error instead of its *degree*." (Emphasis supplied)

Likewise, in *Brinson* v. *Tharin*, 127 So. 313, 316 (Fla., 1930), the Florida Supreme Court said that:

> "The writ, confined to its legitimate scope, may issue within the court's discretion at any time to correct the *procedure* of courts wherein they have not observed those requirements of the law which are deemed to be essential to the administration of justice." (Emphasis supplied)

This specific limitation on the writ has been reiterated by at least two of the District Courts of Appeal in cases arising since the aforesaid constitutional amendment namely, *State v. Katz*, 108 So. 2d 60 (Fla. App., 1959) and *State* v. *Smith*, 118 So. 2d 792 (Fla. App., 1960). The reason for the limitation is clear: Article V, § 6(3) specifically states that the Circuit Courts shall have *final* appellate

jurisdiction over cases arising in Muncipal Courts. As the District Court said in *State* v. *Katz, supra,*:

> "Due regard for the plain language of the Constitution prevents this appellate court from entertaining a *second appeal.* The common law Writ of Certiorari was not meant for and may not be diverted to such purpose." 108 So. 2d 60, 61. (Emphasis supplied)

Likewise in *State* v. *Smith, supra,* the District Court stated:

> " . . . certiorari may not be used in this court for the purpose of securing a second appeal, *nor to produce the merits for review on appeal.*" 118 So. 2d 792, 795. (Emphasis supplied)

Petitioners in their Main Brief on the merits urged four points, namely, (1) complete absence of evidence and therefore a denial of due process under the Fourteenth Amendment; (2) violation of the rights of freedom of speech and assembly; (3) interference with interstate commerce; and (4) denial of equal protection of the laws. Petitioners therefore, raised no jurisdictional issues nor are they concerned with the matters of mere procedure. In the circumstances, therefore, Petitioners submit that following the entry of the Circuit Court's order affirming the Muncipal Court judgment, there was no further adequate state remedy available to them for complete vindiction of their Federal Constitutional rights, and for the reasons that:

(1) The so-called common law writ of certiorari is by nature and as defined by the cases a *limited* form of

review, and does not afford the opportunity of full and complete appellate review on all issues, substantive and procedural, which is the *sine qua non* of a final judgment within the meaning of 28 U.S.C. § 1257.

(2) The issues raised by Petitioners in their Assignments of Error and Main Brief before this Court are not matters of jurisdiction or procedure within the scope of the definition of common-law certiorari as set forth in the above-cited Florida cases.

4. Notwithstanding the rule announced in *American National Bank of Jacksonville* v. *Marks Lumber & Hardware Co.*, *Brison* v. *Tharin*, *State* v. *Katz*, and *State* v. *Smith*, *supra*, some of the cases have granted certiorari where there was an "entire absence of essential evidence with resulting material injury." See e. g., *Haile* v. *Bullock*, 91 So. 683 (Fla., 1922), distinguished in *Brinson* v. *Tharin*, *supra*. But even if it be assumed, *arguendo*, that the evidentiary issue raised by Petitioners might have been reviewed by the District Court of Appeal, nevertheless this feature of the case alone would not have formed a predicate for *full* review of all of the substantive issues raised by Petitioners. The logic of this Court's rule requiring an opportunity for full review is clear: if Petitioners were required to petition the District Court of Appeal for certiorari and if the District Court could only have reviewed the evidentiary issue, then Petitioners would have been precluded from raising the remaining, equally vital substantive issues in this Court, unless they were required to file *two* petitions in this Court, namely, one petition directed to the Circuit Court on the issues of freedom of speech and assembly, interstate commerce, and equal protection, and a second, and necessarily later, petition

directed to the District Court on the evidentiary issue. Surely, 28 U.S.C. § 1257 does not contemplate the filing, in a single case, of two petitions in this Court directed to two separate Florida tribunals, each on different levels of the appellate hierachy, and each of which petitions would necessarily reach this Court at widely separated points of time. Surely § 1257 does not require such bizarre appellate procedure, and clearly Petitioners are not required to risk abandonment of three of their four fundamental constitutional defenses merely because of vagaries of Florida appellate procedure. Cf. *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449; 2 L.Ed 1488; 78 S. Ct. 1163 (1958); *Wright* v. *Georgia*, 373 U.S. 284; 31 Law Week 4487 (1963).

5. Again, and notwithstanding the rule announced in *American National Bank of Jacksonville*, *Brinson* v. *Tharin*, *Katz* and *Smith*, *supra*, some of the Florida cases have added a further variant in the definition of common law certiorari namely, cases where the lower court failed to apply a "correct principle of law" to admitted facts. See, e. g., *Mathews* v. *Metropolitan Life Insurance Company*, 89 So. 2d 641 (Fla., 1956) and *Martin* v. *Powell*, 101 So. 2d 610 (Fla. App., 1958). But even this ostensible expansion of the scope of the writ appears to be simply another way of stating that there must be evidence to support the judgment. Cf. *Richard Store Company* v. *Florida Bridge & Iron, Inc.*, 77 So. 2d, 632 (Fla., 1955). But in any event, any such inconsistencies in the definition or exercise of common law certiorari jurisdiction should not affect this Court's jurisdiction. Petitioners were faced with the clear cut rule announced in *American National Bank of Jacksonville*, *Brinson*, *Katz* and *Smith*, *supra*, on the one hand, and with the murky pronouncements in such cases as *The*

Richard Store Company, Martin v. *Powell* and *Haile* v. *Bullock, supra,* on the other. The Florida Constitution speaks of *final* appellate review in the Circuit Court, the cases speak out against *double appeals* and the courts consistently refer to the *limited* scope of common law certiorari jurisdiction. Nowhere have Petitioners found any case in Florida which would in any way support the proposition that full and complete appellate review would have been available in the District Court of Appeal with respect to *all* of the issues raised in their Assignments of Error and Main Brief. For the Respondent City of Tallahassee to contend otherwise would be for them to place Petitioners in precisely the same position as the petitioners in *N.A.A.C.P.* v. *Alabama, supra,* where the Court stated that:

> "such a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, *because petitioner could not fairly be deemed to have been appraised of its existence.* Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." 357 U.S. 449, 457; 2 L.Ed 2d 1488, 1497. (Emphasis supplied)

Clearly, Petitioners efforts here to seek vindication of all of their Federal constitutional rights, in reliance upon the oft-repeated rule that common-law certiorari refers only to procedural matters, should not be thwarted by any vagaries, novelties or inconsistencies of local appellate rules.

As Petitioners pointed out earlier, Respondent in its initial brief in opposition to the petition, contended that Petitioners must first seek relief from the District Court and thereafter from the Supreme Court of Florida before this Court could acquire jurisdiction. However, any such view would thoroughly emasculate the orderly appellate system provided by the Florida Constitution, and would establish the Supreme Court of Florida as the sole "highest court" under 28 U.S.C. § 1257 *in every case*, thereby depriving both the State Constitution and the Federal Statute of their logic and meaning.

CONCLUSION

For the foregoing reasons Petitioners respectfully submit that no further adequate state remedy was available to them within the meaning of 28 U.S.C. § 1257, and that this Court has jurisdiction to entertain these certiorari proceedings.

Respectfully submitted,

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and HOWARD W. DIXON
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Miami, Florida
and
CARL RACHLIN
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New York, New York
Attorneys for Petitioners

By _____
ALFRED I. HOPKINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplemental Memorandum of Law has, pursuant to Rule 33 (1) of the Rules of The Supreme Court of the United States, been served by air mail upon EDWARD J. HILL, Attorney for Respondent, 216 East Jefferson Street, Tallahasse, Florida, this_____day of October, 1963.

_____

ALFRED I. HOPKINS

IN

Supreme Court of

October

No. —

ISRAEL DRESNER,
ROBERT M. BROWN,
MARTIN FREEDMAN
ROBERT J. STONE, W
J. W. COLLIER, J

v.

CITY OF TA

PETITION FOR WRIT O
CIRCUIT COURT OF T
CIRCUIT, IN AND
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See Library for other copies

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of the United States

r Term, 1962

, AUSTIN M. WARNER,
N, PETTY D. McKINNEY,
N, ARTHUR L. HARDGE,
WAYNE C. HARTMIRE,
JR., RALPH L. ROY,

Petitioners,

vs.

TALLAHASSEE,

Respondent.

OF CERTIORARI TO THE
THE SECOND JUDICIAL
FOR LEON COUNTY,
ORIDA.

ON and HOWARD W. DIXON
r Petitioners
Building
a.

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IN THE

Supreme Court of the United States

October Term, 1962

No. ———

ISRAEL DRESNER, AUSTIN M. WARNER,
ROBERT M. BROWN, PETTY D. McKINNEY,
MARTIN FREEDMAN, ARTHUR L. HARDGE,
ROBERT J. STONE, WAYNE C. HARTMIRE,
J. W. COLLIER, JR., RALPH L. ROY,

Petitioners,

vs.

CITY OF TALLAHASSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, entered on August 16, 1962.

OPINIONS BELOW

Upon the conviction of the Petitioners in the Municipal Court of the City of Tallahassee, an appeal was taken to the Supreme Court of Florida. On November 1, 1961, the Supreme Court of Florida entered its opinion transferring the appeal to the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida. That opinion was reported in 134 So.2d 228 (Fla. 1961) (Appendix A). The Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, affirmed the convictions below on August 16, 1962. An opinion was rendered but not reported. (Appendix B)

JURISDICTION

The judgment of affirmation of the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, was pronounced on August 16, 1962. Jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C.A. §1257 (3).

Article V. Section 6 (3), of the Constitution of the State of Florida provides:

> "Section 6. Circuit Courts.—
>
> "(3) Jursidiction. The circuit courts shall have . . . final appellate jurisdiction in all civil and criminal cases arising in the county court, or before county judges' courts, of all misdemeanors tried in criminal courts of record, and of all cases arising in municipal courts, small claims courts, and courts of justices of the peace . . . "

From the final judgment of affirmation by the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, after the taking of an appeal from the Municipal Court, Petitioners have no further appellate remedy under the Constitution and laws of the State of Florida.

QUESTION PRESENTED

Where a group of Negro and white citizens traveling in interstate commerce arrive at a municipally-owned and operated airport terminal with the publicly announced purpose of determining whether a restaurant and other public facilities in that terminal are available to Negroes on a racially unsegregated basis; and where said restaurant is segregated for the exclusive use of white persons; and where said group seeks food and drink at said restaurant but finds said restaurant closed to them; and where a hostile crowd, which resents the presence and the purposes of said group of Negro and white persons, gathers outside said terminal building; and where said group of Negro and white persons are peaceable and quiet in their words and conduct; and where police and other City officials arrest said group for unlawful assembly, but arrest no one in the hostile crowd; did the arrest and subsequent convictions of the members of said group constitute a denial of due process of law and equal protection of law, an abridgement of privileges and immunities, a denial of freedom of speech and assembly under the Fourteenth Amendment to the Constitution of the United States, a denial of rights under Article I, Section 8, Clause 3 (Interstate Commerce Clause) of the Constitution of the United States, as also a violation of 72 Stat. 737, 49 U.S.C.A. Sec. 1301 et seq (Federal Aviation Act of 1958).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Cited:

(1) The Fourteenth Amendment to the Constitution of the United States provides as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizenship of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(2) The Interstate Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3) provides as follows:

> "Section 8. The Congress shall have power to . . .
>
> "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . "

(3) Article IV, Section 2, of the Constitution of the United States provides as follows:

> "Section 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Florida Constitution Cited:

Article V, Section 6 (3), of the Constitution of the State of Florida as above set forth.

Statutes Cited:

(1) F.S. 870.04 (Laws of Fla. 1961, c. 61-237) provides as follows:

> "870.04. Magistrate to disperse riotous assembly.
>
> "If any number of persons, whether armed or not, are unlawfully, riotously or tumultuously assembled in any county, city or municipality, the sheriff or his deputies, or any constable or justice of the peace of the county, or the mayor, or any commissioner, councilman, alderman or police officer of the said city or municipality, or any officer or member of the Florida highway patrol, shall go among the persons so assembled, or as near to them as may be with safety, and shall in the name of the State command all the persons so assembled immediately and peaceably to disperse; and if such persons do not thereupon immediately and peaceably disperse, said officers shall command the assistance of all persons in seizing, arresting and securing such persons in custody; and if any person present being so commanded to aid and assist in seizing and securing such rioter or persons so unlawfully assembled, or in suppressing such riot or unlawful assembly, refuses or neglects to obey such com-

mand, or, when required by such officers to depart from the place, refuses and neglects to do so, he shall be deemed one of the rioters or persons unlawfully assembled, and may be prosecuted and punished accordingly. As amended Laws 1961, c. 61-223, §1; Laws 1961, c. 61-237, §1."

(2) 72 Stat. 737, 49 U.S.C.A. Sec. 1301 is set forth below.

STATEMENT OF THE CASE

A. Petitioners, comprising a party of Negro and white clergymen, had set forth together from Washington, D. C., to cities in several southern States for the purpose of determining whether certain interstate transportation facilities were available on an integrated basis for persons of the colored race. Petitioners arrived at the Greyhound Bus terminal in Tallahassee on June 15, 1961, and were met by hostile persons who resented their presence and the purpose of their trip. At this time, Petitioners were protected by the local police from any violence. Petitioners procured airline tickets for their return trip to their final destination at New York, New York, and Newark, New Jersey, and then left the bus terminal for the City-owned and operated Tallahassee Municipal Airport preparatory to embarking upon their return flight, and they arrived at the airport in the early afternoon on June 15, 1961.

Upon their arrival, Petitioners sought to be served food and drink at the restaurant located in the terminal, the same being an integral part of the terminal facilities

designed primarily for service to passengers in interstate transportation. The Petitioners discovered, however, that this restaurant was closed to circumvent the necessity for service on a non-segregated basis. Petitioners decided to wait until the restaurant re-opened and in connection therewith they cancelled their reservations for their return trip. They waited in the terminal building until approximately 11:00 p.m. that evening and thereafter returned to the airport on the morning of June 16, 1961. The restaurant was still closed. Petitioners thereupon again cancelled their reservations and made new reservations for their return flight for later that day. While Petitioners were seated in the terminal building awaiting the opening of the restaurant, the City Attorney for the City of Tallahassee approached the Petitioners and demanded that they disperse. Petitioners declined to disperse, and they were thereupon arrested by the police and taken into custody.

The Petitioners' conduct was peaceable at the time of their arrival in Tallahassee, during the time they were at the bus terminal, while they were at the airport terminal, and at the time of their arrest; and at all times material to the matter herein they were quiet, dignified, and polite in their words and acts.

The Petitioners were charged as follows:

> "BEFORE ME, JOHN A. RUDD, Judge of the Municipal Court of the City of Tallahassee, Florida, personally appeared JAMES MESSER, JR., and EDW. J. HILL, who, being duly sworn, say that on, to-wit: the 16th day of June, 1961, upon property owned and operated by the City of

Tallahassee, Florida, and located in Leon County, Florida, namely, the Tallahassee Municipal Airport, ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ARTHUR L. HARDGE, ROBERT J. STONE, WAYNE C. HARTMIRE, J. W. COLLIER, JR., RALPH L. ROY, CHAS. A. HUNTER, JOHN J. POLAND, JR., and PRISCILLA G. STEPHENS: COUNT I, Did then and there unlawfully assemble in that they did, and they being more than three (3) persons, meet together to commit a breach of the peace, acting together and concertedly to occupy and to continuously occupy certain chairs and seating facilities in the Tallahassee Municipal Airport, making and cancelling group airline reservations on the two (2) operating airline schedules departing Tallahassee on the said date, and on June 15, 1961, and meeting together in concert attendant with circumstances calculated to excite alarm, endanger the public peace and excite fear, and in such nature as to inspire well-grounded fear in persons of reasonable courage, of riot, or other breaches of public peace, and while so unlawfully assembled a police officer of said City did go among these persons so assembled, and making himself known to them and each of them, did, in the name of the State and City, command those so unlawfully assembled to immediately and peaceably disperse, and they and each of them did then and there refuse and/or neglect to obey such command when given, contrary to the laws and ordinances of said

City in such cases made and provided, and against the peace and dignity of the said City of Tallahassee, Florida."

Petitioners moved to quash the aforesaid charges, but the said motions were denied. Following the trial, the Municipal Court of the City of Tallahassee found the Petitioners guilty of unlawful assembly as charged and ordered them to pay fines of $500.00 each or, alternatively, to serve sixty (60) days each in the City Jail. Petitioners thereupon filed an appeal in the Supreme Court of Florida. The Supreme Court of Florida ruled that it lacked jurisdiction to entertain the appeal and transferred the appeal to the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, said court having final appellate jurisdiction on all appeals from Municipal Courts in the State of Florida. The Circuit Court subsequently entered its order affirming the judgment of conviction of the Municipal Court.

B. Federal Questions Raised Below in the Trial Court and Before the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, having Appellate Jurisdiction.

The Federal questions were first raised prior to arraignment on the day of the trial when the Petitioners moved to quash and dismiss the charges on the grounds that they were being deprived of their rights as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, and that Chapter 61-237 (F.S. 870.04) was unconsitutional under the said provisions of the United States Constitution (Appendix C).

Subsequent to the convictions in the Municipal Court, the Petitioners appealed to the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida. In their Assignments of Error, they again raised their defenses of denial of rights under the First and Fourteenth Amendments to the Constitution of the United States (Appendix D).

ARGUMENT

I.

Petitioners submit that their arrests and convictions violate the guarantees of due process of law contained in the Fourteenth Amendment to the Federal Constitution for the reason that there was no evidence whatsoever supporting a conviction for unlawful assembly.

In *Thompson v. City of Louisville*, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624 (1960), the petitioner had been charged with loitering and with disorderly conduct arising out of his allegedly being "argumentative" with the police over his arrest. The United States Supreme Court reviewed the entire record and found that there was no evidence to convict the petitioner. The Court stated categorically that it is a "violation of due process to convict and punish a man without evidence of his guilt" (4 L.Ed.2d 654, 659). As to the charge of disorderly conduct, the Court noted that:

> "There is no testimony that petitioner raised his voice, used offensive language, resisted the officers or engaged in any conduct of any kind likely in any way to adversely affect the good

order and tranquility of the City of Louisville." (4 L.Ed.2d 654, 659)

This principle was re-affirmed by the United States Supreme Court in *Garner v. Louisiana*, 368 U.S. 157, 7 L. Ed.2d 207, 82 S.Ct. 248 (1961), wherein the Supreme Court set aside convictions of "sit-in" demonstrators who had been charged with unlawful assembly and which convictions were not based upon evidence to support the findings of any violations of the State's unlawful assembly statute.

In *Taylor v. Louisiana*, 370 U.S. 154, 8 L.Ed.2d 395, 82 S.Ct. 1188, the Supreme Court of the United States held that a State conviction for disturbing the peace was based on constitutionally insufficient evidence where proof showed only the entry of a Negro into a white waiting room at an interstate transportation facility.

II.

Petitioners submit that their arrests and convictions violate their freedom of speech and assembly as guaranteed under the due process clause of the Fourteenth Amendment to the United States Constitution. The announced purpose of Petitioners' trip was to determine whether restaurant and other facilities in interstate transportation terminals were available to Negroes on an unsegregated basis, and they peacefully assembled and peacefully demonstrated to communicate their opposition to the admitted practice of racial segregation.

Petitioners' activities are entitled to the same protection as that given to peaceful picketing, and their conduct

is protected by the principles announced by the United States Supreme Court in *Thornhill v. Alabama*, 310 U.S. 88, 84 L.Ed. 1093, 60 S.Ct. 736 (1940).

The conditions obtaining in the case at Bar have a striking analogue in the case of *Cooper v. Aaron*, 358 U.S. 1, 3 L.Ed.2d 5, 78 S.Ct. 1401 (1958), where the School Board of Little Rock, Arkansas, petitioned the Federal courts for delay in the program of school desegregation at that city's Central High School because of community hostility and violence towards Negroes. The Supreme Court of the United States refused to suspend the desegregation order and held that such violence did not afford a basis for denying the Negro students their civil rights. The Court stated that:

> "The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature (of Arkansas)."

In *Rockwell v. Morris*, 211 N.Y.S.2d 25, affirmed 215 N.Y.S.2d 502 (1961), cert den 368 U.S. 913, 7 L.Ed.2d. 131, 82 S.Ct. 194 (1961), the appellant, a self-styled American Nazi, ha dapplied for a permit to use a public park in New York City to make a public political speech and had been denied the permit on the ground that if he spoke it was "inevitable that public disorder and rioting will result" (211 N.Y.S.2d 25, 28). The New York Court, however, held that the denial of the permit was an unconstitutional prior restraint on freedom of speech. The Court was presented with a community situation much like that in the case at Bar. New York City, with two and one-half million Jews,

was obviously a hostile ambiance for a neo-nazi propagandist. Tallahassee, a city practicing apartheid in many respects, has been anything but hospitable to those who have urged a change in its attitudes in its race relations.

III.

The arrests and convictions of the Petitioners constitute an undue burden on passengers in interstate commerce in violation of the Interstate Commerce Clause (Article I, Section 8, Clause 3) of the United States Constitution under the principles announced by the Supreme Court of the United States in *Morgan v. Virginia*, 328 U.S. 373, 90 L. Ed. 1317, 55 S.Ct. 1050 (1946); *Edwards v. California*, 314 U.S. 160, 86 L.Ed. 119, 62 S.Ct. 164 (1941); *Boynton v. Virginia*, 364 U.S. 454, 5 L.Ed.2d 206, 81S.Ct. 182 (1960.)

IV.

The aforesaid arrests and convictions deprived Petitioners of one of the basic privileges and immunities of Federal citizenship, namely, the right to travel throughout the nation free of unreasonable restraint imposed by the States and unfettered by unlawful arrests. This right of national citizenship, guaranteed by Article IV, Section 2, of the United States Constitution, was announced by the Supreme Court long ago in *Crandall v. Nevada*, 73 U.S. 35, 18 L.Ed. 745 (1868), and was re-affirmed in *The Slaughter-House Cases*, 83 U.S. 36, 21 L.Ed. 394 (1873); *Twining v. New Jersey*, 211 U.S. 78, 53 L.Ed. 97, 29 S.Ct. 14 (1908).

V.

The arrests and convictions constitute state denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution, because the police and city officials arrested the Petitioners who were peacefully demonstrating against unlawful racial segregation; instead of arresting a single one of the violent demonstrators outside the terminal; and this discriminatorily applied c. 61-237, Acts of Florida 1961 (F.S. 870.04) in contravention of the principles announced by the United States Supreme Court in *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886) and in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed.2d 45, 81 S.Ct. 856 (1961).

The Petitioners' arrests and convictions for unlawful assembly, while interstate passengers awaiting service integrated service at the food counter which had previously been given to other interstate passengers only on a segregated basis, deprived them of equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. *Cooper v. Aaron*, supra, held that the petitioner's constitutional rights could not be annihilated by municipal or State officials. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 6 L.Ed.2d 45, 81 S.Ct. 856 (1961), the Supreme Court of the United States held that a restaurant owned by a municipality but leased to and operated by private persons cannot discriminate in the service of food to the public on the basis of color.

VI.

The arrests and convictions are invalid for the rea-

son that they are in conflict with the provisions of the Federal Aviation Act of 1958 (72 Stat. 737, 49 U.S.C.A. Sec. 1301 et. seq.), and in particular Section 404 of said Act (72 Stat. 760, 49 U.S.C.A. Sec. 1374) which provides, in pertinent part, that:

> "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

TOBIAS SIMON and HOWARD W. DIXON
Attorneys for Petitioners
706 Ainsley Building
Miami 32, Fla.

By _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has, pursuant to Rule 33 (1) of the Revised Rules of The Supreme Court of The United States, been served by mail upon EDWARD J. HILL, Attorney for Respondent, 216 East Jefferson Street, Tallahassee, Florida, by air mail this _____ day of November, 1962.

_____

APPENDIX A

[TITLE OMITTED]

OPINION OF THE SUPREME COURT OF FLORIDA

Filed November 1, 1961.

An Appeal from the Municipal Court, in and for the City of Tallahassee, John A. Rudd, Judge.

THORNAL, J.

We have for consideration a motion to dismiss a direct appeal from the Municipal Court of the City of Tallahassee.

We must decide whether this Court has jurisdiction to consider the appeal.

The City charged that the appellants did "unlawfully assemble . . . contrary to the laws and ordinances of said City in such cases made and provided, and against the peace and dignity of the said City of Tallahassee, Florida." A trial in the municipal court culminated in a finding of guilt and a sentence to pay a fine with an alternative term in the city jail. At the outset of the trial the appellants moved to dismiss the complaint with the contention that Section 870.04, Florida Statutes, as amended by Chapter 61-237, Laws of Florida, 1961, was being invalidly applied against them. The City Judge announced that "the statute is not unconstitutional on its face." Coming here directly from the municipal court appellants contend that the trial judge passed directly on the validity of a state statute and that we, therefore, have jurisdiction pursuant to Section 4, Article V, Florida Constitution. The appellee's motion to dismiss questions the juris-

diction of this Court to determine the matter on a direct appeal. This motion has been argued and is now here for disposition.

The appellants were charged with the violation of the municipal ordinances of the City of Tallahassee. Nowhere in the complaint were they charged with a violation of a state statute. A reference to Section 870.04, supra, as amended, will reveal that the statute condemns a riotous assembly and provides a penalty under Section 870.02, Florida Statutes. The offense described in the statute is a misdemeanor triable in the state courts. The statute does not even impliedly define a municipal offense. This distinction is important in determining our jurisdiction. It is perfectly clear that the municipal judge was not confronted by the necessity of passing directly on the validity of a state statute. The most that could be said would be that he was called upon to pass upon the validity of a municipal ordinance. In actuality, the record indicates that he was merely requested to decide that "the statute" was invalid "as applied to the appellants." The real contention asserted before the trial judge questioned the application of the statute, rather than its fundamental validity.

This Court derives its appellate jurisdiction from Article V, Florida Constitution. By Section 4(2), Article V, supra, appeals from trial courts may be taken directly to this Court from certain specified types of judgments. Among these are "final judgments or decrees directly passing upon the validity of a state statute . . . or construing a controlling provision of the Florida or federal constitution . . . " We must look to this constitutional provision as the source of our jurisdiction to entertain the instant appeal.

It is clear that the trial judge, at most, was called upon to pass upon the validity of a municipal ordinance. This is so because the appellants were charged with a violation of the municipal ordinances, rather than with a violation of a state statute. We have long ago held under Section 4(2), Article V, supra, that this Court did not have the power to entertain a direct appeal from a judgment of a trial court which merely passes upon the validity of a municipal ordinance. For purposes of determining the jurisdiction of this Court, a municipal ordinance cannot be classified as a "state statute." Armstrong et al v. City of Tampa, Fla. 1958, 106 So. 2d 407. While conceivably a municipal court could be considered as a "trial court" from which a direct appeal could come here if in some peculiar situation the municipal court passed directly upon the validity of a state statute, such is not and could not have been the instant situation. Boyd v. County of Dade, Fla. 1960, 123 So. 2d 323. Moreover, even though the appellants attempted to question the validity of the application of the cited statute, they did not in any fashion assault the fundamental validity of the statute itself. Jurisdiction comes to us by direct appeal when the validity of the statute is assaulted and passed upon. When the problem involves the validity of the application of an otherwise valid statute, a direct appeal here is not available unless there be a final judgment or decree which construes a controlling provision of the State or federal constitutions. Stein v. Darby, et al., opinion filed October 11, 1961. In the instant case there was certainly no such construction. The final judgment of the municipal judge merely contained a finding of guilt and the assessment of the fine. Nowhere in the record is there a construction of the constitution. Armstrong v. City of Tampa, supra.

Although ordinarily motions of the type involved here would be disposed of without opinion, we deemed it appropriate to elaborate on our reasons for the future guidance of the Bar.

Finding as we do that this Court is without jurisdiction to hear the instant appeals, the motion to dismiss is well-taken. However, we will treat the motion as a motion to transfer an appeal improvidently lodged in this Court. Rule 2.la (5)(d), Florida Appellate Rules. Under Section 6, Article V, Florida Constitution, the circuit courts have jurisdiction to hear appeals from municipal courts when they involve questions such as those presented here. It is, therefore, ordered that within five days from the filing of this opinion all papers, records, briefs and other documents, including the notice of appeal, be and the same are hereby transferred to the Circuit Court, Second Judicial Circuit for appropriate disposition. Our opinion is not to be construed as in any fashion passing upon the merits of the appeal or the sufficiency of the record, including the notice of appeal. These are matters to be disposed of by the circuit court in the exercise of its appellate jurisdiction.

It is so ordered.

ROBERTS, C. J., HOBSON, DREW and O'CONNELL, JJ., concur

APPENDIX B

[TITLE OMITTED]

ORDER AFFIRMING JUDGMENTS OF THE CIRCUIT COURT OF LEON COUNTY, FLORIDA

This is an appeal from convictions in the Municipal Court of the City of Tallahassee, Florida of the ten appellants named in the caption who were charged with unlawful assembly. A fine was assessed against each of them with an alternate jail sentence.

The formal charge is in a single count naming the ten appellants and three others* as defendants and alleges an unlawful assembly on June 16, 1961 "in that, they being more than three (3) persons, met together to commit a breach of the peace, acting together and concertedly to occupy and continuously occupy certain chairs and seating facilities in the Tallahassee Municipal Airport, making and cancelling group airline reservations on the two (2) operating airline schedules departing Tallahassee on said date, and on June 15, 1961, and meeting together in concert attendant with circumstances calculated to excite alarm, endanger the public peace and excite fear, and in such nature as to inspire well-grounded fear in persons of reasonable courage, of riot, or other breaches of public peace, and while so unlawfully assembled" were commanded by a police officer of the city, after identifying himself as such, to immediately and peaceably disperse, and they refused or neglected to do so.

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*Of these three one was acquitted and the other two were granted a nolle prosequi.

The appellants contend that the judgments pursuant to convictions violate their rights guaranteed by the Florida and United States Constitutions in that they have been denied the equal protection of the laws and have been deprived of liberty or property without due process of law. They contend that the state statute, Chap. 61-237, Laws of 1961, (F. S. 870.04), (which, by reference adoption in a municipal ordinance,* is made an ordinance of the City of Tallahassee) is unconstitutional and void, either on its face or as it has been applied to the appellants in this case.

The pertinent portions of the statute, adopted as an ordinance, are:

> "If any number of persons . . . are unlawfully, riotously or tumultuously assembled in any . . . city or municipality . . . any . . . police officer of said city or municipality . . . shall go among the persons so assembled . . . and shall, in the name of the state command all the persons so assembled immediately and peaceably to disperse; and if such persons do not thereupon immediately and peaceably disperse, said [officer] shall command the assistance of all persons in seizing, arresting and securing such persons in custody; and if any person present . . . when required by such [officer] to depart from the place, refuses or neglects to do so, he shall be deemed one of . . . the persons unlawfully assembled and may be prosecuted and punished accordingly."

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*Sec. 23-38, Tallahassee Code, provides that it shall be unlawful for any person to commit any act which is or shall be recognized by the laws of the state as a misdemeanor. The penalty is a maximum fine of $500.00 or 60 days imprisonment or both.

The facts in the case are not in dispute and squarely present the question as to whether or not the conduct of the appellants was an exercise by them of rights they hold under state and federal constitutional provisions, which would preclude their prosecution, conviction and sentence for unlawful assembly in the trial court.

The appellants are clergymen, two being rabbis and the others being ordained ministers of several Protestant denominations. They are residents of New Jersey, New York, Massachusetts or Connecticut. Some of them are of the white race and some are negroes. About June 12 or 13, 1961 they, together with eight other clergymen from the same general area, departed from Washington, D. C. by interstate common carrier bus for a so-called "Freedom Ride" into Virginia, the Carolinas, Georgia, and Florida. The bus ride terminated in Tallahassee June 15, 1961. The "Freedom Riders" left their buses at the Greyhound bus terminal there and went into the terminal lunch room to obtain food which was served them.

This trip was sponsored and at least partially financed by an organization known as C O R E (Congress on Racial Equality) which has been aggressive in promoting racial integration and desegration. The trip was well publicized, having been given wide coverage in all news media including radio and television. The time and place of arrival in Tallahassee was heralded and well known.

The purposes of the "Freedom Ride", as stated by appellant Collier, who was the spokesman for the group, were two-fold: (1) To ascertain whether or not there were

facilities available on an integrated basis to interstate passengers in waiting rooms, in rest rooms, in eating facilities in the terminals through which they would pass; and (2) To bear witness as ministers, rabbis and clergymen to the struggle to obtain those rights "guaranteed us by the Constitution."

Shortly prior to the time the buses bearing the "Freedom Riders" were scheduled to arrive at about noon on June 15, there had gathered in the vicinity of the bus station a number of persons and groups of persons. Law enforcement officers, including city police, had been dispatched to the area to prevent any disturbance. It was suspected that resentment against the "Freedom Riders" might result in some attempts at violence toward them or precipitate other disorders. When the buses arrived, law enforcement personnel moved in and gave protection to the passengers as they left the bus and entered the lunch room in the terminal. Apparently they were served in the lunch room under circumstances and policies satisfactory to them.

In approximately an hour after arrival at the bus terminal the eighteen "Freedom Riders" proceeded to the Tallahassee Municipal Airport ostensibly for the purpose of boarding a 3:25 P. M. Eastern Air Lines plane for passage to Washington, Newark, or New York. They were transported to the airport in private cars presumably furnished by local sympathizers with their objectives.

Upon arrival at the airport they found that the restaurant there had been closed. When the time approached for arrival of the 3:25 plane the ten appellants cancelled the reservation they had previously made for the flight.

The other eight boarded the plane when it arrived and departed for their destinations in the East.

At that time, the airport arrangement provided separate waiting rooms, or areas, for white and negro; also separate rest rooms; and separate areas for serving food, the white area being a glassed-in place and the negro consisting of a counter with several stools. However, as mentioned before, the eating service had been discontinued by the closing of the restaurant facilities. A sandwich vending machine was in the lobby, but the prices on same had been marked up from previous prices.

The appellants stayed together in a more or less compact group in the lobby area most of the time and no attempt was made to enforce separation of the races in the waiting room. Rest rooms were used by them without observing the designation of the segregated facilities.

After cancelling their reservations for the 3:25 P. M. flight they sought and ultimately obtained reservations for a flight the next morning at 8:25 on an E. A. L. plane. They remained in the airport until about 11:00 P. M. that evening for the purpose of observing if the restaurant would open and service be granted to them. The restaurant remained closed.

Law enforcement officers, including city police, were detailed to keep order. The activities and objectives of the appellants had been the subject of news reporting and groups of people were seen to be gathering or attempting to gather in the vicinity of the airport. There were critical and hostile comments made about the appellants. The police turned away some of those gathering when it

was apparent such persons had no airport business or interest. Persons were even screened at the entrance and turned away by officers if they had no business to transact at the airport.

The chief of police advised the appellants that the airport terminal would close for the night at approximately 11:45 P. M. and a spokesman for appellants requested protection as they moved from the airport into the city and also on the return to the airport the next morning. Such protection by escort of law enforcement officers was provided.

The appellants thus left the airport at about 11:00 P. M. on the 15th to return the next morning prior to the scheduled departure at 8:25 A. M. of the plane on which they had obtained reservations. They were given escort security protection on both the occasions of leaving and returning to the terminal.

The restaurant was also closed on the morning of June 16. At 8:15 A. M. all ten of the appellants cancelled their reservations for the 8:25 flight and remained in the waiting room after that flight had departed. At 8:20 A. M. they sought, and ultimately obtained, reservations on a National Airlines flight scheduled to depart at 1:47 P. M. that day, but cancelled just prior to noon.

During these periods there continued to be movements and gathering of groups of people in cars and there was a hostility and open resentment against the conduct and attitudes of the appellants. A considerable number of police, sheriff's deputies and highway patrolmen had been detailed to prevent disorder. City, county and state

officials, including the Governor, were apprehensive and moved to provide necessary law enforcement personnel to preserve order.

At about 12:15 P. M., Mr. James Messer, Jr., city attorney of Tallahassee and a special police officer of the city, after conferring with the mayor and chief of police of the city, approached the appellants who were together and inquired if there was a leader of the group. Appellant Collier arose and identified himself and assumed to act as spokesman. Mr. Messer identified himself and his official positions, exhibiting his police badge. Others in the group gathered around Mr. Messer and Rev. Collier and Mr. Messer read to them a proclamation. He stated that the assembly of the appellants at the Municipal Airport of Tallahassee will tend to create a disturbance or incite a riot or disorderly conduct within the City of Tallahassee at its Municipal Airport over which the city had jurisdiction. He mentioned incidents of the previous night and fears of more unrest. He then commanded them in the name of the state and city to immediately and peaceably disperse, and explained that such meant from the airport property. He then added that failure to so disperse would result in arrest for unlawful assembly. Collier asserted that they were interstate passengers, to which Messer replied that he did not consider them to be bona fide passengers in view of their reservation cancellations.

Several local sympathizers with the appellants dispersed, but appellants failed to do so. After about 1½ minutes, Mr. Messer turned to the Chief of Police and remarked "Chief, you can carry out your orders." The appellants were arrested and taken into custody.

The appellants take the view that the segregation

practices with regard to waiting rooms, rest room facilities, and restaurant or eating facilities at the airport were violative of constitutional guarantees of equal protection of the law. They would also inject into the case the installation of sandwich and cigarette machines, at or just prior to their arrival, which inflated the prices of merchandise vended to double what it had been. The closing of the restaurant on the day of their arrival and its opening shortly after their departure is viewed as an important factor.

These facts are, in the view of this Court, not at all significant in the legal problems involved in the charge against the appellants and the disposition of such charge by the trial court.

The municipality of Tallahassee operates in a proprietary capacity and in a governmental capacity. Among its proprietary functions is the ownership and operation of a municipal airport and supervision over the concessions there. Assuming, but not deciding, that its policies of segregation of the races in its facilities are unlawful and did constitute a violation of some duty to the appellants if enforced against them, and further assuming, without deciding, that the closing of the restaurant under the circumstances violated some duty to them, do such circumstances justify a concerted protest demonstration by appellants of their views and convictions over a protracted period of time during which tensions and tempers rise in the community which threaten to erupt into disorder and thus render the city, in its governmental capacity, powerless to terminate the demonstration in the exercise of its police power?

Stated another way, may not a lawful assembly for the purpose of protesting and demonstrating opposition to a course of policy practiced by the municipality become an unlawfully assembly when pursued to unreasonable lengths imposing unreasonable burdens on others, after the lawful objectives of the demonstration had been fairly accomplished?

It is fundamental that our constitutions accord to the citizen of the United States the right of freedom of speech and of assembly and to peaceably petition for a redress of grievances. Such freedoms are jealously guarded and when exercised in good faith and in good order may not be lawfully interfered with by governmental action. However, it is not a license to take into one's own hands the enforcement of law or by excessive harassment, effect coercion and acceptance of one's convictions and interpretations of legal rights by governmental entities whose policies are in conflict. Such procedures wholly ignore the very machinery provided by the constitutions and laws of the nation and state for the declaring, securing and enforcement of constitutional and other legal rights. It is the courts, both state and federal, to whom resort is readily available for citizens to seek recognition and enforcement of legal rights and immunities. That such courts may not move as swiftly as the individual would wish does not authorize pursuit of personal means which unnecessarily create or threaten public disturbance or disorder, or which substantially interfere with normal, orderly functions of a public facility.

Such a procedure is a form of anarchy which, if it becomes an accepted practice, can have only the effect of seriously weakening orderly government.

The appellants, prior to the reading of the riot act to them, had achieved their announced objectives. They had observed both at the bus station and the airport the integration or lack of it of the waiting room, rest room and restaurant facilities. They had very effectively borne witness as clergymen and otherwise of their sympathy with the struggle to obtain desegregation of the various facilities of interstate travel.

To accommodate and facilitate those legitimate objectives the law enforcement agencies of city, county and state had given protection against potential violence or other disorder from groups or individuals who resented the activities of the appellants. This protection was afforded at the bus station, at the airport on the afternoon of June 15, on the evening of June 15 when the appellants left the airport to come into town and on the following morning when they returned to the airport purportedly to take an early plane. However, instead of using the reservations they had obtained they made a cancellation. This was thrice they had made last minute cancellations of reservations for the sole reason that they wished to eat in the restaurant, which was closed. In the meantime their conduct and persistence was arousing increased resentment and anger in the community with threats of violence and disorder toward the appellants.

Obviously, the conduct of appellants had revealed a pattern. They would make reservations for travel, wait in the lobby until just before the plane they were scheduled to take arrived and then cancel, make reservations on a later flight and then again cancel at the last minute, at all times remaining in the airport but never taking a plane. The effect is obvious. The seats and other facilities

are occupied by them and their use denied to those who actually wished to travel. The use of rest rooms and wash rooms by them partakes more of lodging than a comfort feature for those whose sole purpose is some airport business. The reservation of space and last minute cancellation prevented the use of that space of the flights involved, resulting in loss and inconvenience to the air line involved and probable denial to other would-be travelers of the use of that space. The sole purpose of such a course of harassment was to goad the municipality and its restaurant lessee to open the restaurant and gratify the appellants' wishes that they be served in the style and manner they deemed to be their right.

Controversies between citizens and governmental units are not unique. In nearly every instance there is a conflict in what the citizen contends he has a right to claim and the governmental entity which would deny the validity of such claim. The citizen may freely express his views and seek to cultivate converts to them with a view of bringing moral or political pressures on the officers of the public body to accord his demands. However, such means must be exercised in a manner that is reasonable and not harmful to the rights of others or the peace and good order of the community. Especially is this true when the controversy is one of public interest in which there are strong and emotional feelings on the part of a substantial number of persons in the community.

The courts, both state and federal, are open to resolve controversies on constitutional issues in duly instituted and processed civil actions. Indeed, the very issue in the demonstrations of the appellants was subsequently presented to and adjudicated by the United States Dis-

trict Court for the Northern District of Florida. Brooks, et al v. Tallahassee, 202 Fed. Supp. 56. When citizens press their demonstrations in behalf of a cause (however worthy they deem their objectives to be) beyond the bounds of fully and effectively delivering their message and reach the stage that they materially and harmfully interfere with the orderly business and lawful activities of others, who are acting in public or private capacities, then the conduct is disorderly and assembly for carrying it out is unlawful. Such was the case here.

The judgments appealed from are hereby affirmed.

Affirmed.

BEN C. WILLIS
Circuit Judge

APPENDIX C

MOTION TO QUASH AND DISMISS PRIOR TO ARRAIGNMENT BEFORE THE MUNICIPAL COURT IN AND FOR THE CITY OF TALLAHASSEE, a Municipal corporation of Florida.

MR. SIMON: At this time, if your Honor please, the defense will move to quash and to dismiss the charges against these defendants on the following grounds:

First, that the charges of the City of Tallahassee do not state an offense against the defendants under the ordinances of the City of Tallahassee or the statutes of the State of Florida.

Second, the alleged offenses occurred beyond the city limits of the City of Tallahassee and this Court is without jurisdiction to try these offenses.

Third, the statute pursuant to which the defendants were arrested and with which the defendants are charged and which they are charged with having violated, namely Florida Statutes, Chapter 61-237, is invalid and is unconstitutional, constitutes a denial of rights under the Declaration of Rights of the Florida Constitution and constitutes a denial of rights under the Federal Constitution to the United States and the First and Fourteenth Amendments thereto and as a consequence these arrests were unlawful and the charges based thereon are without foundation.

Next, the defendants which constitute a party of Negroes and whites who were located in a municipally-

owned airport in the City of Tallahassee and were attempting to use the public facilities of this airport on a racially unsegregated basis acted at all times in a peaceful and dignified manner; their arrests constitute a denial to the defendants of the equal protection of the law under the Fourteenth Amendment to the Federal Constitution and a denial of due process of law, a denial of privileges and immunities of State citizenship guaranteed thereby; a denial of the privileges and immunities of Federal citizenship since they were at all times on and in an instrumentality of the municipality of Tallahassee and were attempting to use the facilities thereof, which facilities are required by Federal law to be made available to all citizens without regard to their race or color.

Next the defendants at the time of the arrests were passengers in interstate commerce awaiting departure at the Municipal Airport of Tallahassee of their plane from Tallahassee to points beyond the State of Florida and their arrests constitute a violation of their rights of unfettered travel free of racial discrimination under the Interstate Commerce Clause of the Federal Constitution, namely Article I, Section 8, Clause 3, and a violation of their privileges and immunities of Federal citizenship, a violation of the Federal Aviation laws and a violation of the Federal Aviation Act of 1958 and, in particular, Section 404 of said act, same being 72 Statute 760, 49 U.S. Code, Section 1374-B.

The arrests of the defendants and their prosecution constitute a violation of their liberty of contract as guaranteed by the Fourteenth Amendment to the Federal Constitution.

Next, the acts of the City officials in arresting and in participating in the arrests of these defendants and these prosecutions based thereon and the concomitant failure of the City officials to arrest certain other persons in the vicinity who were threatening to exhibit acts of violence because of the defendants' presence at the aforesaid airport and because of the defendants' endeavor to use the airport facilities on an unsegregated basis constitutes racial discrimination in violation of the due process clause —

THE COURT: Hold on a minute.

Are you making a motion, arguing a motion or are you testifying?

MR. SIMON: I am making a motion.

THE COURT: Leave out your facts and make the motion according to law.

MR. SIMON: (Continuing) —in violation of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and corresponding provisions of the Florida Constitution whereby the defendants respectfully move this Court to quash and dismiss the information and charges herein filed.

APPENDIX D

ASSIGNMENTS OF ERROR.

1. The Court erred in entering its judgment against the defendants for the reason that the statute pursuant to which the defendants were arrested and which the defendants are charged with having violated, namely, F.S. Chapter 61— is invalid and unconstitutional and violates the rights of the defendants under the Florida and Federal Constitutions and denies to them the due process of law and the equal protection of laws and consequently, the defendants were unlawfully and illegally arrested and the charges placed against them were without foundation.

2. The Court erred in entering its judgment against the defendants for the further reason that the said arrests and charges constitute a denial to the defendants of the equal protection of the law under the Fourteenth Amendment to the Federal Constitution; a denial of due process of law guaranteed thereby; a denial of the privileges and immunities of State citizenship guaranteed thereby; and a denial of the privileges and immunities of Federal citizenship since the defendants were deprived of restaurant facilities in the Tallahassee Municipal Airport owned and operated as an instrumentality of the City of Tallahassee, by reason of their color or association with persons of color, and the said facilities were not made available to them without regard to their race or color.

3. The Court erred in entering its judgment against the defendants for the reason that the defendants were passengers in interstate commerce awaiting departure of their plane from Tallahassee to points outside the State

of Florida, and consequently the racially discriminatory arrests and prosecutions brought against the defendants, constitute a violation of their rights of unfettered travel free of racial discrimination under the Interstate Commerce Clause of the Federal Constitution (Article I, Section 8, Clause 3), a violation of their privileges and immunities of Federal citizenship, a violation of the Federal Aviation Laws, and a violation of the Federal Aviation Act of 1958, and in particular, Section 404 of said Act (72 Stat. 760; 49 U.S.C.A., Section 1374 (b)).

4. The Court erred in entering judgment against the defendants for the reason that the arrests of the defendants and their prosecution in view of the evidence constitutes a violation of their liberty of contract as guaranteed by the Fourteenth Amendment to the Federal Constitution.

5. The Court erred in entering its judgment against the defendants for the reason that the acts of the City officials in arresting and prosecuting the defendants who constituted a party of Negroes and persons in association with Negroes and who were peaceable, quiet, and dignified at all times, constitute patent racial discrimination by a municipality in violation of the due process clause and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

6. The Court erred in entering its judgment against the defendants for the reason that the same was contrary to the weight of the evidence.

7. The Court erred in entering its judgment against

the defendants for the reason that the same was contrary to law.

8. The Court erred in entering its judgment against the defendants for the reason that the arrests of the defendants and their subsequent trial and conviction by the Municipal Court in and for the City of Tallahassee constituted racial discrimination against the defendants by reason solely of their color or association with persons of color in violation of the obligations placed upon the States by the Fourteenth Amendment to the Constitution of the United States not to discriminate against any person or persons solely by reason of their color or associations with persons of color.

9. The Court erred in entering its judgment against the defendants for the reason that the arrests of the defendants by peace officers and public officials of the City of Tallahassee and the defendants' subsequent trial and conviction in and by the Municipal Court in and for the City of Tallahassee, constituted State aid of racial discrimination against the defendants by reason solely of their color or association with persons of color by a lessee-restauranteur (at the airport) of the City of Tallahassee, in violation of the obligations placed upon the States by the Fourteenth Amendment to the Constitution of the United States not to discriminate against any person or persons solely by reason of their color or association with persons of color, and also in violation of the Federal Aviation Act of 1958 and in particular, Section 404 of said Act (72 Stat. 760; 49 U.S.C.A., Section 1374 (b)), and in further violation of the obligations placed upon the City of Tallahassee, a Florida Municipal Corporation, by the provisions of F.S. 332.08 (3).

IN THE

Supreme Court of the United States

October Term, 1963

No. 35

ISRAEL DRESNER, AUSTIN M. WARNER,
ROBERT M. BROWN, PETTY D. McKINNEY,
MARTIN FREEDMAN, ARTHUR L. HARDGE,
ROBERT J. STONE, WAYNE C. HARTMIRE,
J. W. COLLIER, JR., RALPH L. ROY,
Petitioners,

v.

CITY OF TALLAHASSEE,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

BRIEF FOR THE PETITIONERS

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IN THE

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BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the court below, the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida (hereinafter referred to as the Circuit Court), affirming Petitioners' convictions by the trial court, is not reported, but is set forth in full in the Record. (R. 156)

JURISDICTION

The judgment of the Circuit Court was entered on August 16, 1962. (R. 156) The Petition for Writ of Certiorari was filed herein on November 13, 1962, and the Petition was granted by this Court on April 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Article V § 6(3) of the Constitution of the State of Florida provides that the Circuit Courts shall have final appellate jurisdiction of all cases arising in municipal courts. Petitioners were convicted by the Municipal Court of the City of Tallahassee, Florida, and the convictions were affirmed by the Circuit Court. As pointed out in the Petition for Writ of Certiorari and in Petitioners' Reply Brief filed herein, the Circuit Court is the highest court of the State of Florida in which a decision could be had within the meaning of 28 U.S.C. 1257.

QUESTION PRESENTED

Where a group of Negro and white clergymen, traveling in interstate commerce, gather at a municipally-owned and operated airline terminal building, with the announced purpose of determining whether the restaurant and other facilities in the building are racially unsegregated; and where the facilities are in fact segregated in favor of white persons only; and where a crowd gathers outside the terminal building and voices belligerent objection to the clergymen's views and purposes; and where the clergymen do not utter words of incitement or interfere with any busi-

ness of the terminal; and where the police arrest the clergymen for unlawful assembly, but arrest no one in the hostile crowd; did the subsequent convictions for unlawful assembly constitute (1) a denial of due process of law; (2) an abridgement of freedom of speech and freedom of assembly; (3) a violation of the interstate commerce clause; and (4) a denial of the equal protection of the laws?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment and the Interstate Commerce Clause of the Federal Constitution.

2. Article V, § 6(3) of the Florida Constitution, which provides, in pertinent part, that:

> "the Circuit Courts . . . shall have final appellate jurisdiction . . . of all cases arising in municipal courts . . . "

3. Florida Statutes, § 870.04, which provides in pertinent part as follows:

> "If any number of persons, whether armed or not, are unlawfully, riotously or tumultuously assembled in any county, city or municipality . . . any police officer . . . shall go among the persons so assembled, or as near to them as may be with safety, and shall in the name of the state command all the persons so assembled immediately

> and peaceably to disperse; and if such persons do not thereupon immediately and peaceably disperse, said officers shall command the assistance of all persons in seizing, arresting and securing such persons in custody . . . . "

4. Florida Statutes § 332.08, which provides in pertinent part that:

> " . . . a municipality which has established . . . airports . . . or which has acquired or set apart or may hereafter acquire or set apart real property for such purposes, is hereby authorized . . .
>
> (3) . . . to confer the privileges of concessions of supplying upon its airports goods, commodities, things, services, and facilities; provided, that in each case in so doing the public is not deprived of its rightful equal and uniform use thereof."

5. § 28-38 of the 1957 City of Tallahassee Code, which provides as follows:

> "It shall be unlawful for any person to commit, within the corporate limits of the city, any act which is or shall be recognized by the laws of the state as a misdemeanor, and the commission of any such acts is hereby forbidden." (R. 152)

STATEMENT OF THE CASE

This appeal is from a conviction of Petitioners for unlawful assembly. The City of Tallahassee charged that on June 16, 1961 the Petitioners unlawfully assembled in

the Tallahassee Municipal Airport in that they "met together to commit a breach of the peace, acting together and concertedly to occupy and to continuously occupy certain chairs and seating facilities in the Tallahassee Municipal Airport, making and cancelling group airline reservations on the two (2) operating airline schedules departing Tallahassee on the said date, and on June 15, 1961, and meeting together in concert attendant with circumstances calculated to excite alarm, endanger the public peace and excite fear, and in such nature as to inspire well-grounded fear in persons of reasonable courage, of riot, or other breaches of public peace", and that while so assembled a police officer went among them and commanded them to disperse, and they refused to obey the officer's command. (R. 1)

The charge was made and the convictions were had pursuant to § 23-38 of the 1957 City of Tallahassee Code, which incorporated by reference the State unlawful assembly statute, Florida Statutes, § 870.04, *supra.* (R. 157)

Petitioners were tried in the Tallahassee Municipal Court on June 22, 1961. The trial court denied Petitioners' several motions to quash and dismiss the charges (R. 4; 75), found the Petitioners guilty of unlawful assembly, as charged, and ordered them to pay fines of $500.00 each or alternatively to serve sixty days each in the city jail. (R. 144) Petitioners thereupon filed an appeal to the Supreme Court of Florida, which Court ruled that it lacked jurisdiction to entertain the appeal and transferred the cause to the Circuit Court (R. 153), which subsequently affirmed the judgments of the Municipal Court. (R. 156)

Petitioners, comprising a party of Negro and white

clergymen, had set forth together from Washington, D. C. to cities in several southern states for the purpose of determining whether certain interstate transportation facilities were available on an integrated basis for Negroes, and to identify themselves publicly with those groups opposed to practices of racial segregation. (R. 79, 95, 122, 126, 132) Petitioners left Washington, D. C. by bus and traveled to Tallahassee, Florida, passing through the states of Virginia, North Carolina, South Carolina, and Georgia en route. (R. 78, 79) Petitioners arrived at the Greyhound bus terminal in Tallahassee on June 15, 1961 and were met by a hostile crowd of persons who resented their presence and the purpose of their trip and who threatened them with mob violence. However, Petitioners were protected from this crowd by the local police at the bus terminal. (R. 8, *et seq.*) Meanwhile, Petitioners procured airline tickets for their return trip to their final destinations at New York City and Newark, New Jersey (R. 78), and left the bus terminal for the Tallahassee municipal airport preparatory to embarking upon their return flight, arriving there in the early afternoon of June 15, 1961. (R. 80)

Upon their arrival at the airport, Petitioners were met by another hostile crowd which also voiced belligerent objection to their presence and to the purpose of their trip and threatened them with violence. (R. 44 *et seq.*) A large number of police officers were present, and they formed a cordon around the airport terminal building to separate the hostile crowd from the Petitioners. (R. 22)

When they arrived at the airport terminal building, Petitioners sought to be served food and drink at the restaurant located therein and which was publicly designated for the use of white persons only. They discovered, how-

ever, that this restaurant was closed. (R. 82) Petitioners then waited for the restaurant to re-open and in that connection cancelled their reservations for their return trips scheduled for that evening and made new reservations for the following morning. They waited in the terminal building until approximately 11:00 P.M. that evening and then left without having obtained any restaurant service. (R. 82)

On the following morning of June 16, 1961, Petitioners returned to the airport and while waiting in the terminal building for their return flight again sought service in the restaurant. (R. 82) However, the restaurant was still closed and Petitioners again cancelled their reservations and made new reservations for their return flights for later that day. Again a large, hostile crowd gathered at the airport, and while Petitioners were thus seated in the terminal building and awaiting the opening of the restaurant, the City Attorney accompanied by the Chief of Police and other police officers, approached the Petitioners, and read to them a proclamation which commanded that they disperse immediately or else they would be arrested for unlawful assembly. (R. 15-17; Def. Ex. 2, R. 146)

Petitioners declined to disperse, and they were thereupon arrested by the police and taken into custody. (R. 18)

Within the Airport terminal building, which is owned and operated by the City of Tallahassee (R. 17), there are two eating establishments. The restaurant mentioned above is a glass-enclosed dining room, which was conspicuously designated for the exclusive use of white persons; the other

is a small lunch counter which was conspicuously designated for the exclusive use of Negroes. (R. 33) There were also separate and segregated waiting rooms for Negro and white passengers, and separate and segregated rest-rooms in the terminal building. (R. 34) The restaurant facilities are leased by the City to The American News Company, Inc., a Delaware corporation, pursuant to a lease dated October 20, 1960. (R. 104) The manager of the restaurant testified that Negroes were never served in the glass enclosed dining room. (R. 105)

Petitioners' conduct was peaceable at the time of their arrival in Tallahassee, during the time they were at the bus terminal, while they were at the airport terminal, and at the time of their arrest, and at all times material to this cause they were quiet, dignified and polite in their words and acts. The station manager of Eastern Airlines at the Tallahassee airport testified that:

> "They were very polite and very co-operative asking for what they wanted and how they wanted it." (R. 38)

The Chief of Police testified that they were merely sitting in the white waiting room and that he did not see them creating a disturbance. (R. 49, 51)

A police lieutenant testified that he did not hear any of the Petitioners make any threats. (R. 66) The Petitioners themselves testified that they were peaceable. Rev. J. W. Collier, Jr. testified as follows:

> "Q During the period of time that ensued from the moment you first arrived at the airport until

that time will you describe your conduct to the Court?

"A We sat in the lobby, in the waiting room; we read the newspapers; we read books which members of our party had with us and we quietly conversed among us.

"Q Were you loud, noisy or boisterous in any manner?

"A At no time in any way.

"Q Did you at any time threaten any person or persons?

"A We did not." (R. 84)

All of the Petitioners are men of the cloth. (R. 77-135, *passim.*)

Contrasted with the conduct and character of the Petitioners, was that of the crowd gathered outside the airport. The Chief of Police gave the following testimony:

"A It was generally talked around the terminal that there was possibly going to be some violence if the defendants continued to stay there." (R. 44)

* * * *

"Q Mr. Stoutamire, the question was rather long, but, in effect, it was did you have reason to believe that the continued presence of the defendants at the airport building would tend to incite a riot, cause a disturbance and disorderly conduct?

* * * *

> "A I did, based on the facts that on Thursday night, what happened there then, and what the defendants requested, that they be protected and that they had requested protection the following morning back to the airport and when I got there with the Freedom Riders they there asked if I would give them protection while they was there." (R. 47)
>
> * * * *
>
> "A As I stated before the publicity that had been in the newspapers and on radios prior to them coming to Tallahassee about what had happened in other towns, the newspapers and radios that was giving the information that they would be here at a certain time, people in my opinion in the City and in the County was somewhat enraged about the fact that they were coming." (R. 52)

The police lieutenant testified to the same effect. (R. 64-67), and the State Attorney also testified that:

> "From talking to the people there and seeing the scene I knew that those people outside would have given trouble if the officers had not been present to take care of the situation." (R. 73)

Notwithstanding the foregoing, however, the police made no effort to disperse this crowd (R. 64), and arrested no one in the crowd. (R. 50)

The Petitioners were at all times material to this cause passengers in interstate commerce and at all times

material to this cause possessed interstate airplane tickets and reservations. (R. 37, 41, 78)

As noted above, the announced purpose of the Petitioners' trip was to determine what facilities were available to Negroes on an unsegregated basis in the several transportation terminals they visited during the course of their trip and make known their opposition to racial segregation in such facilities. Thus Petitioner Collier testified:

> "A There was a two-fold purpose: First, we wanted to ascertain whether or not there were facilities available on an integrated basis to interstate passengers in waiting rooms, in restrooms, in eating facilities in the terminals through which we would pass.
>
> "Secondly, we wanted to bear our witness as ministers, rabbis and clergymen to the struggle to obtain these rights guaranteed us by the Constitution." (R. 79)

Petitioners Dresner, Freedman and Hartmire all testified to the same effect. (R. 95; 122; 132)

Notwithstanding the fact that the airport and the terminal building located thereon are owned and operated by the City of Tallahassee, the city and its lessee jointly maintain a policy of racial segregation in the restaurant facilities (R. 33-34; 105), and the lunch counter available to Negro passengers was an admittedly unequal facility. (R. 138-139) Moreover, these eating facilities were segregated notwithstanding the fact that the restaurants, together with the restrooms and waiting rooms, all formed an integral part of the airport terminal building. (R. 34; 87)

Although the white restaurant had been open and serving the white public prior to the Petitioners' arrival, it was closed during the entire time the Petitioners were in the terminal building and did not reopen until the Petitioners had left. Both the restaurant manager and the city manager testified that the restaurant was closed for two reasons: first, to repair certain refrigeration equipment, and secondly to avoid possible violence. (R. 102; 136-141)

SUMMARY OF ARGUMENT

1. The City failed to present evidence establishing the requisite elements of the offense of unlawful assembly; hence the convictions, without evidence, violated due process of law. Further, since there was no evidence of unlawful assembly, there was no adequate state ground for the convictions. Petitioners' conduct was peaceable at all times, and they uttered no words of incitement. The fact that others in the vicinity violently resented their objectives and sentiments regarding desegregation does not justify the convictions for unlawful assembly. Further, even though the Petitioners were in a public building, there is no evidence that they interfered in any way with the business or activities of the terminal building, the airlines, or any other passengers.

2. On the other hand, even assuming that the judgments of the Municipal Court and the opinion of the Circuit Court establish that under Florida law the offense of unlawful assembly was made out in the circumstances of this case, the convictions would necessarily be in violation of the rights of freedom of speech and assembly as guaranteed by the due process clause of the Fourteenth

Amendment. Petitioners assembled peaceably within the terminal building to protest illegal conduct by the City and the lessee-restaurant within the terminal building itself, i.e., their policies of racial segregation, and did so without interfering with the normal business of the terminal building, or the airlines, or other passengers. Consequently, Petitioners' conduct cannot be said to have presented a clear and present danger of any substantive evil, or to any substantial interest of the City, which could have justified such a denial of freedom of speech and assembly. Moreover, the fact that Petitioners' peaceable conduct, which protested the illegal practices of the City and its lessee, may have been the reason for the gathering of a hostile crowd, did not warrant their arrest and convictions, since Petitioners did not utter any words of incitement.

3. Since there was no city ordinance providing reasonable times for assemblies of persons within the terminal building, Petitioners had the right to so assemble there (a) so long as they did not interfere with the facilities of the terminal building, or the airlines, or other passengers; (b) since they all had flight reservations, and therefore legitimate business, in the terminal building; and (c) since the terminal building itself was the very locus of the unlawful racial segregation which the Petitioners were protesting.

4. The arrests and convictions herein constituted an undue burden on interstate commerce in that the City unlawfully interfered with Petitioners' rights of peaceful and unfettered travel in interstate commerce.

5. The actions of the police and cit yofficials in ar-

resting and convicting Petitioners, who were peacefully demonstrating against unlawful segregation and who were peacefully seeking unsegregated food service, and in failing and refusing to arrest a single person in the violent mob outside the terminal building, discriminatorily applied the City ordinance and the Florida unlawful assembly statute, and thus denied Petitioners the equal protection of the laws.

ARGUMENT

I.

Petitioners were peaceable and orderly at all times; hence, there was no evidence whatsoever to support the convictions below for unlawful assembly, and therefore Petitioners have been denied due process of law under the Fourteenth Amendment.

As stated in the Circuit Court's Opinion (R. 157), Petitioners were charged and convicted pursuant to §23-28 of the 1957 City of Tallahassee Code which incorporated by reference Florida Statutes, §870.04, *supra.* The gravamen of the charge, of the City Attorney's proclamation, and of the foregoing statute, is the offense of unlawful assembly. The Statute does not define the offense and it does not appear that the Florida Supreme Court has ever defined it or has ever interpreted this or any similar statute. Consequently, it is necessary to have recourse to the common law definition. *People* v. *Perry,* 193 N.E. 175 (NY., 1934) In the leading case of *State* v. *Butterworth,* 142 A. 57; 58 A.L.R. 744 (N.J., 1928), the Court stated that at common law:

> "in order to constitute the offense of unlawful assembly, it must appear that there was a common intent of the persons assembled to attain a purpose, whether lawful or unlawful, by the commission of such acts of intimidation and disorder which are likely to produce danger to the tranquility and peace of the neighborhood, and have a natural tendency to inspire rational, firm, and courageous persons in the neighborhood with well grounded fear of serious breaches of the public peace." 142 A. 57, 60.

That case involved the arrest of some 1,500 to 2,000 persons assembled to protest alleged suppression of union activities. The Court reversed the convictions and stated that:

> "Neither of the officers related a single act or alarming circumstance done or created by any one of the defendants or of any act threatening the public peace done by any of the persons assembled there, or which was of an unusual, boisterous, or disorderly nature." 142 A. 57, 60.

In the leading English case of *Beatty* v. *Gillbanks*, 47 L. T. Rep. N.S. 194; 15 Cox C.C. 138; 9 Q.B. 308 (1882), the defendants were members of the Salvation Army, which on previous occasions had paraded through an English town and collided with an antagonistic organization known as the "Skeleton Army", and great disorder had ensued. Thereafter, and notwithstanding an official notice directing all persons to abstain from assembling to the disturbance of the public peace, defendants led another procession through the streets, and were surrounded by a "tumultuous

and shouting mob of some hundred persons". The police ordered the defendants to disperse, but they refused, and they were arrested and convicted of unlawful assembly to the disturbance of the public peace. On appeal the convictions were set aside. The Appellee contended that similar parades in the past had resulted in riots, and that the defendants knew that such would occur if they paraded again. In reply, the Court declared that:

> "everyone must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants, they would be liable, and the justices would have been right in binding them over. *But the evidence set forth in the case does not support this contention; on the contrary, it shews that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them.*" 9 Q. B. 308, 311-312. (Emphasis supplied)

* * * *

> "What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, *that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a position,* and the question of the justices whether the facts stated in the case constitute the offence charged

> in the information must therefore be answered in the negative." 9 Q. B. 308, 312-313. (Emphasis supplied)

Accord: *Reg.* v. *Clarkson*, 17 Cox's Criminal Law Cases 483 (Eng. 1892).

The *Beatty* case is essentially on all fours with the case at bar, for there is not a scintilla of evidence in the record that Petitioners' conduct was anything but peaceable and orderly. Petitioners submit that it is an outrageous application of the doctrine of unlawful assembly to convict peaceable persons simply because others, who belligerently object to their presence, but who are in no way threatened with any personal or proprietary damage, threaten to become disorderly. Such has not been the law of unlawful assembly and so to distort it in this case would be to allow a conviction to stand without evidence to support it and in violation of due process of law. *Taylor* v., *Louisiana*, 370 U.S. 154; 8 L.Ed.2d 395; 82 S.Ct. 1188 (1962); *Garner* v. *Louisiana*, 368 U.S. 157; 7 L.Ed.2d 207; 82 S.Ct. 248 (1961); and *Thompson* v. *City of Louisville*, 362 U.S. 199; 4 L.Ed.2d 654; 80 S.Ct. 624 (1960). Petitioners point out that in *Taylor*, the Court found that there "was no evidence of violence"; that the record "shows that petitioners were quiet, orderly, and polite"; and that "the only evidence to support the charge was that petitioners were violating a custom that segregated people in waiting rooms according to their race, a practice not allowed in interstate transportation facilities by reason of federal law." 370 U.S. 154, 155-156; 8 L.Ed.2d 395, 396.

The Court will also note that the language of Florida Statutes §870.04, *supra*, is directed at persons "unlawfully,

riotously, or tumultuously assembled." Since Petitioners were not assembled "unlawfully" within the meaning of the common law as noted above, and since the record shows that they were not assembled "riotously or tumultuously", the convictions were not supported by evidence to make out the offense described by the Florida statute.

Finally, the Circuit Court in its opinion made certain assumptions concerning the effect of the Petitioners' conduct which are in no way supported by the record. The Circuit Court asserted that the facilities of the terminal building were denied to other persons, that the airline was inconvenienced, and that other would-be travelers were denied space on air flights. (R. 164, 165) However, there is absolutely no evidence in the record that any persons having business in the terminal were inconvenienced or denied the use of the facilities or services of the airline, or that any other passengers were in any way inconvenienced. Certainly as the court indicated in *Garner*, the Circuit Court could not take judicial notice of such presumed "facts" without violating due process of law. 7 L.Ed. 2d 207, 219.

Petitioners submit, therefore, that there was not an adequate state ground for the convictions, and that the convictions without evidence, violated due process of law.

II.

The convictions constituted a violation of Petitioners' rights of freedom of speech and freedom of assembly as guaranteed by the Fourteenth Amendment.

Even assuming, *arguendo*, that Petitioners' conduct could be deemed to have constituted a common law or statutory crime under Florida law, nevertheless their convictions cannot be squared with the rights of freedom of speech and freedom of assembly guaranteed by the Fourteenth Amendment. The announced purpose of their trip was to determine whether restaurants and other facilities in interstate transportation terminals were available to Negroes on an unsegregated basis, and they assembled and demonstrated peacefully to communicate their opposition to these illegitimate practices of racial segregation. Their objectives were clearly lawful, since "no State may require racial segregation of interstate or intrastate transportation facilities." *Bailey* v. *Patterson*, 369 U.S. 31, 33; 7 L.Ed.2d 512, 514; 82 S.Ct. 549 (1962); *Turner* v. *City of Memphis*, 369 U.S. 350; 7 L.Ed.2d 762; 82 S.Ct. 805 (1962); *Baldwin* v. *Morgan*, 287 F.2d 750 (5th Cir., 1961); *Henry* v. *Greenville Airport Commission*, 279 F.2d 751 (4th Cir., 1960); *Derrington* v. *Plummer*, 240 F.2d 922 (5th Cir., 1956); *Coke* v. *City of Atlanta*, 184 F.Supp. 579 (N.D. Ga., 1960); Cf. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; 6 L.Ed.2d 45; 81 S.Ct. 856 (1961).

Indeed, the action of the City officials and the American News Company in maintaining segregated restaurant facilities was in blatant violation of the law of the State of

Florida, viz., Florida Statutes §332.08(3) which authorizes municipalities to:

> "confer the privileges of concessions of supplying upon its airports goods, commodities, things, services and facilities; *provided, that in each case in so doing the public is not deprived of its rightful equal and uniform use thereof.*" (Emphasis supplied)

If any further or final proof of the legitimacy of this Freedom Ride were needed, it was clearly provided by the case of *Brooks* v. *Tallahassee*, 202 F. Supp. 56 (N.D. Fla., 1961) where, subsequent to the convictions below, suit was brought against the City of Tallahassee to enjoin any further racial segregation in the Tallahassee airport terminal itself and appropriate injunctive relief was granted by the District Court.

Since the Petitioners' objectives were legitimate and their assembly was peaceable, since there is no evidence that their assembly interfered with the normal functions of the terminal building, or the operations of the airlines, or with other passengers, can we say that they created such a clear and present danger of any substantive evil or to any substantial municipal interest which could have justified their convictions? The complaint of the Circuit Court, the Municipal Court and the City officials appears to be two-fold: (1) that there was danger of public disorder because of Petitioners' locally unpopular views on racial desegregation; and (2) that the assembly, having taken place in the airport terminal building, wrongfully interfered with the facilities of that building.

The short answer to the first objection is that, absent the use of words of incitement, the mere fact that the announcement of unpopular views may provoke others to commit or threaten to commit acts of disorder in no way justifies state action in derogation of the rights of freedom of speech and freedom of assembly. *Edwards* v. *South Carolina*, 372 U.S. 229; 31 Law Week 4225 (1963); *Cantwell* v. *Connecticut*, 310 U.S. 296, 84 L.Ed. 1213; 60 S.Ct. 900 (1940); *Terminiello* v. *Chicago*, 337 U.S. 1; 93 L.Ed. 1131; 69 S.Ct. 894 (1949); *De Jonge* v. *Oregon*, 299 U.S. 353; 81 L.Ed. 278; 57 S.Ct. 255 (1937); *CORE* v. *Douglas*, 31 Law Week 2571; ___F.2d___ (5th Cir., 1963); *Nesmith* v. *Alford*, 31 Law Week 2622; ___F.2d___ (5th Cir., 1963); *Sellers* v. *Johnson*, 163 F.2d 877 (8th Cir., 1947); *Rockwell* v. *Morris*, 211 N.Y.S.2d 25; aff'd 215 N.Y.S.2d 502 (1961); Cf. *Cooper* v. *Aaron*, 358 U.S. 1, 3 L.Ed.2d 5; 78 S.Ct. 1401 (1958).

As to the second objection, Petitioners submit that since there was no statute or ordinance in effect regulating the time, place and manner of public assemblies in the terminal building, the Petitioners, having acted and assembled peaceably and for a legal objective, had the right to assemble and demonstrate in the terminal building, since it was the very site of the evil of which they complained. In *Edwards* v. *South Carolina*, *supra*, the Petitioners comprised a group of 187 Negroes who had assembled on the grounds of the South Carolina State House and a crowd of 200 to 300 onlookers had collected around them. This Court stated:

> "We do not review in this case criminal convictions resulting from the even-handed application of a precise and narrowly drawn regulatory stat-

> ute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-308; *Garner* v. *Louisiana*, 368 U.S. 157, 202 (concurring opinion). These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, 'not susceptible of exact definition.' And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." 31 Law Week 4225, 4227.

Compare *Schneider* v. *Irvington*, 308 U.S. 147; 84 L.Ed. 155; 60 S.Ct. 146 (1939) and *Kunz* v. *New York*, 340 U.S. 290; 95 L.Ed. 280; 71 S.Ct. 312 (1951), where the Court upheld the right of speech and assembly in such public and municipally-owned areas as streets and parks.

In *Niemotko* v. *Maryland*, 340 U.S. 268; 95 L.Ed. 267; 71 S.Ct. 325 (1951), the appellant had been convicted of disorderly conduct for holding a meeting of Jehovah's Witnesses in a public park without a permit. There was no city ordinance regulating the use of the parks, and the Court stated that:

> "The conclusion is inescapable that the use of the

> park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views. The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." 340 U.S. 268, 272; 95 L.Ed. 267, 271.

So, in the case at bar, "the conclusion is inescapable" that the City's interference with Petitioners' assembly was the result of the unpopularity of their views. This is made eminently clear from the trial court's views on "public order" made at the conclusion of the trial:

> "Gentlemen, it is not my business to lecture but I want to assure you that if I thought for one minute or if the facts in this case supported the thought for one minute that you all came here on a noble, Christian purpose and had acted accordingly when instructed to vacate and leave that you would not be here. I am not attempting to change wish that you would stop and think this: When you do get back home to your respective cities that you would check the criminal rates and the prostitution rates and the racial strife as compared to what you find in Tallahassee and then when you have cleaned up your own bailiwick or whatever it is, then we would welcome your suggestions.
>
> "Until that time I think you have more than you can do at home. You came here for the sole

purpose of forcing your opinions and your views on this community. No matter how noble your reasoning sounds to you or how you have testified in this court it all boils down simply to that fact. You all have traveled a thousand miles in order to be deprived of something that you had at home already and then you get all of the United States embroiled in something." (R. 145)

III.

The arrests and convictions herein constituted an undue burden on interstate commerce in violation of the interstate commerce clause of the Federal Constitution.

This Court has held that the states may not impose unreasonable restraints on passengers traveling in interstate commerce and undue burdens on such travelers have been held to be unconstitutional. *Morgan* v. *Virginia*, 328 U.S. 373; 90 L.Ed. 1317; 55 S.Ct. 1050 (1946); *Edwards* v. *California*, 314 U.S. 160; 86 L.Ed. 119; 62 S.Ct. 164 (1941).

In the case at bar, Petitioners were passengers in interstate commerce, they were peaceful in their conduct at all times in the course of their travel, and the purpose of their trip was perfectly lawful. Certainly the City had no such legitimate interest in convicting Petitioners which could have justified the restraints it imposed on their rights of peaceful and unfettered travel in interstate commerce.

Moreover, the City unlawfully interfered with Petitioners' right to eat, as guaranteed to passengers in transit

in interstate commerce. In *Boynton* v. *Virginia*, 364 U.S. 454, 463; L.Ed.2d 206, 212; 81 S.Ct. 182 (1960), the Court stated that:

> "Interstate passengers have to eat, and the very terms of the lease of the built-in restaurant space in this terminal constitute a recognition of the essential need of interstate passengers to be able to get food conveniently on their journey and an undertaking by the restaurant to fulfill that need."

Here, as in *Boynton*, the terminal restaurant was an integral part of the terminal facilities. (R. 34; 87) Further, the Petitioners testified at length as to their desire to eat at the restaurant. Petitioner Collier stated:

> "Our purpose was, inasmuch as there was time prior to the departure of the plane and since I among others had not eaten, to eat prior to leaving and to test the facilities as I indicated earlier." (R. 162)

Petitioner Collier further stated that his purpose in returning to the airport on the morning of June 16 was: "To be served in the restaurant prior to leaving." (R. 83) Petitioners Dresner, Warner and Hartmire testified to like effect. (R. 123; 126; 133)

Petitioners contend, therefore, that the City interfered with this right to eat, which for interstate passengers is a right recognized and protected by the Court's ruling in *Boynton* v. *Virginia, supra.*

IV.

The arrests and convictions herein constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

The police and city officials in arresting and convicting the Petitioners, who were peacefully demonstrating against unlawful racial segregation and who were peacefully seeking unsegregated food service, and in failing and refusing to arrest a single person in the violent mob outside the terminal building, discriminatorily applied the city ordinance and Florida Statutes §870.04, and in violation of the principle announced by the Court in *Yick Wo* v. *Hopkins*, 118 U.S. 356; 30 L.Ed. 220; 6 S.Ct. 1064 (1886), where the Court held that:

> "The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution."

CONCLUSION

For the foregoing reasons Petitioners pray that the judgments below be reversed, that the convictions be set aside and that the charges be quashed and dismissed.

Respectfully submitted,

ALFRED I. HOPKINS, TOBIAS SIMON,
and HOWARD W. DIXON
223 Southeast First Street
Miami, Florida

and

CARL RACHLIN
280 Broadway
New York, New York
Attorneys for Petitioners

By_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for the Petitioners has, pursuant to Rule 33 (1) of the Rules of The Supreme Court of the United States, been served by air mail upon EDWARD J. HILL, Attorney for Respondent, 216 East Jefferson Street, Tallahassee, Florida, this _____ day of August, 1963.

_____

Mss 546 SEDFRE C.O.R.E. (Dresher et al) vs. City of Tallahassee - Cont - Aug. 1962 - March 1964 (Correspondence, notes & Miscellaneous)

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August 17, 1962 VLADECK & ELIAS

John W. P. Collier, Jr.
Israel S. Dresner
Wayne C. Hartmire, Jr.
Petty D. McKinney
Robert McAfee Brown
Priscilla Stephens

A. M. Warner
Rabbi Martin Freedman
Arthur L. Hardge
Rev. Ralph Lord Roy
Robert J. Stone (Rev.)

RE: Dresner, et al, advs City of Tallahassee

Ladies and Gentlemen:

I have been advised by telegram that judgments of conviction in the Municipal Court of Tallahassee have just been affirmed by the Supreme Court of Leon County. Happily, the case against Priscilla Stephens was reversed.

I will await copies of the opinion of the Court and will proceed to file an appeal.

Very truly yours,

SIMON & ROSEN

BY:
For the Firm

TS:ev

cc: Carl Rachlin, Esq.

Dear Toby
Thank you for your letter of the 17th inst.
Trust you will send me a copy of the opinion
so we can assess the future
Regards

August 20, 1962

Tobias Simon, Esq.
706 Ainsley Building
14 N.E. First Avenue
Miami 32, Florida

Dear Toby:

Thank you for your letter of the 17th inst. I trust you will send me a copy of the opinion so we can assess the future.

Regards,

CR:cr

CARL RACHLIN

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA. AT LAW.

NO. 10084

ISRAEL DRESNER, AUSTIN M. WARNER, ROBERT M. BROWN, PETTY D. McKINNEY, MARTIN FREEDMAN, ROBERT J. STONE, ARTHUR L. HARDGE, WAYNE C. HARTSHIRE, J. W. COLLIER, JR., RALPH LORD ROY,

Appellants,

A P P E A L

vs.

CITY OF TALLAHASSEE,

Appellee.

ORDER AFFIRMING JUDGMENTS

This is an appeal from convictions in the Municipal Court of the City of Tallahassee, Florida of the ten appellants named in the caption who were charged with unlawful assembly. A fine was assessed against each of them with an alternate jail sentence.

The formal charge is in a single count naming the ten appellants and three others* as defendants and alleges an unlawful assembly on June 16, 1961 "in that, they being more than three (3) persons, met together to commit a breach of the peace, acting together and concertedly to occupy and continuously occupy certain chairs and seating facilities in the Tallahassee Municipal Airport, making and cancelling group airline reservations on the two (2) operating airline schedules departing Tallahassee on said date, and on June 15, 1961, and meeting together in concert attendant with circumstances calculated to excite alarm, endanger the public peace and excite fear, and in such nature as to inspire well-grounded fear in persons of reasonable courage, of riot, or other breaches of public peace, and while so unlawfully assembled" were commanded

---

* Of these three one was acquitted and the other two were granted a nolle prosequi.

by a police officer of the city, after identifying himself as such, to immediately and peaceably disperse, and they refused or neglected to do so.

The appellants contend that the judgments pursuant to convictions violate their rights guaranteed by the Florida and United States Constitutions in that they have been denied the equal protection of the laws and have been deprived of liberty or property without due process of law. They contend that the state statute, Chap. 61-237, Laws of 1961, (F. S. 870.04), (which, by reference adoption in a municipal ordinance,* is made an ordinance of the City of Tallahassee) is unconstitutional and void, either on its face or as it has been applied to the appellants in this case.

The pertinent portions of the statute, adopted as an ordinance, are:

> "If any number of persons----are unlawfully, riotously or tumultuously assembled in any---- city or municipality-----any--police officer of said city or municipality----shall go among the persons so assembled-----and shall, in the name of the state command all the persons so assembled immediately and peaceably to disperse; and if such persons do not thereupon immediately and peaceably disperse, said [officer] shall command the assistance of all persons in seizing, arresting and securing such persons in custody; and if any person present----then required by such [officer] to depart from the place, refuses or neglects to do so, he shall be deemed one of--- the persons unlawfully assembled and may be prosecuted and punished accordingly."

The facts in the case are not in dispute and squarely present the question as to whether or not the conduct of the appellants was an exercise by them of rights they hold under state and federal constitutional provisions, which would preclude their prosecution, conviction and sentence for unlawful assembly in the trial court. .

---

* Sec. 23-38, Tallahassee Code, provides that it shall be unlawful for any person to commit any act which is or shall be recognized by the laws of the state as a misdemeanor. The penalty is a maximum fine of $500.00 or 60 days imprisonment or both.

The appellants are clergymen, two being rabbis and the others being ordained ministers of several Protestant denominations. They are residents of New Jersey, New York, Massachusetts or Connecticut. Some of them are of the white race and some are negroes. About June 12 or 13, 1961 they, together with eight other clergymen from the same general area, departed from Washington, D. C. by interstate common carrier bus for a so-called "Freedom Ride" into Virginia, the Carolinas, Georgia, and Florida. The bus ride terminated in Tallahassee June 15, 1961. The "Freedom Riders" left their buses at the Greyhound bus terminal there and went into the terminal lunch room to obtain food which was served them.

This trip was sponsored and at least partially financed by an organization known as C O R E (Congress on Racial Equality) which has been aggressive in promoting racial integration and desegregation. The trip was well publicized, having been given wide coverage in all news media including radio and television. The time and place of arrival in Tallahassee was heralded and well known.

The purposes of the "Freedom Ride", as stated by appellant Collier, who was the spokesman for the group, were two-fold: (1) To ascertain whether or not there were facilities available on an integrated basis to interstate passengers in waiting rooms, in rest rooms, in eating facilities in the terminals through which they would pass; and (2) To bear witness as ministers, rabbis and clergymen to the struggle to obtain those rights "guaranteed us by the Constitution."

Shortly prior to the time the buses bearing the "Freedom Riders" were scheduled to arrive at about noon on June 15, there had gathered in the vicinity of the bus

station a number of persons and groups of persons. Law enforcement officers, including city police, had been dispatched to the area to prevent any disturbance. It was suspected that resentment against the "Freedom Riders" might result in some attempts at violence toward them or precipitate other disorders. When the buses arrived, law enforcement personnel moved in and gave protection to the passengers as they left the bus and entered the lunch room in the terminal. Apparently they were served in the lunch room under circumstances and policies satisfactory to them.

In approximately an hour after arrival at the bus terminal the eighteen "Freedom Riders" proceeded to the Tallahassee Municipal Airport ostensibly for the purpose of boarding a 3:25 P. M. Eastern Air Lines plane for passage to Washington, Newark, or New York. They were transported to the airport in private cars presumably furnished by local sympathizers with their objectives.

Upon arrival at the airport they found that the restaurant there had been closed. When the time approached for arrival of the 3:25 plane the ten appellants cancelled the reservation they had previously made for the flight. The other eight boarded the plane when it arrived and departed for their destinations in the East.

At that time, the airport arrangement provided separate waiting rooms, or areas, for white and negro; also separate rest rooms; and separate areas for serving food, the white area being a glassed-in place and the negro consisting of a counter with several stools. However, as mentioned before, the eating service had been discontinued by the closing of the restaurant facilities. A sandwich vending machine was in the lobby, but the prices on same had been marked up from previous prices.

The appellants stayed together in a more or less compact group in the lobby area most of the time and no attempt was made to enforce separation of the races in the waiting room. Rest rooms were used by them without observing the designation of the segregated facilities.

After cancelling their reservations for the 3:25 P. M. flight they sought and ultimately obtained reservations for a flight the next morning at 8:25 on an E. A. L. plane. They remained in the airport until about 11:00 P. M. that evening for the purpose of observing if the restaurant would open and service be granted to them. The restaurant remained closed.

Law enforcement officers, including city police, were detailed to keep order. The activities and objectives of the appellants had been the subject of news reporting and groups of people were seen to be gathering or attempting to gather in the vicinity of the airport. There were critical and hostile comments made about the appellants. The police turned away some of those gathering when it was apparent such persons had no airport business or interest. Persons were even screened at the entrance and turned away by officers if they had no business to transact at the airport.

The chief of police advised the appellants that the airport terminal would close for the night at approximately 11:45 P. M. and a spokesman for appellants requested protection as they moved from the airport into the city and also on the return to the airport the next morning. Such protection by escort of law enforcement officers was provided.

The appellants thus left the airport at about 11:00 P. M. on the 15th to return the next morning prior to the scheduled departure at 8:25 A. M. of the plane on which they had obtained reservations. They were given escort

security protection on both the occasions of leaving and returning to the terminal.

The restaurant was also closed on the morning of June 16. At 8:15 A. M. all ten of the appellants cancelled their reservations for the 8:25 flight and remained in the waiting room after that flight had departed. At 8:20 A. M. they sought, and ultimately obtained, reservations on a National Airlines flight scheduled to depart at 1:47 P. M. that day, but cancelled just prior to noon.

During these periods there continued to be movements and gathering of groups of people in cars and there was a hostility and open resentment against the conduct and attitudes of the appellants. A considerable number of police, sheriff's deputies and highway patrolmen had been detailed to prevent disorder. City, county and state officials, including the Governor, were apprehensive and moved to provide necessary law enforcement personnel to preserve order.

At about 12:15 P. M., Mr. James Messer, Jr., city attorney of Tallahassee and a special police officer of the city, after conferring with the mayor and chief of police of the city, approached the appellants who were together and inquired if there was a leader of the group. Appellant Collier arose and identified himself and assumed to act as spokesman. Mr. Messer identified himself and his official positions, exhibiting his police badge. Others in the group gathered around Mr. Messer and Rev. Collier and Mr. Messer read to them a proclamation. He stated that the assembly of the appellants at the Municipal Airport of Tallahassee will tend to create a disturbance or incite a riot or disorderly conduct within the City of Tallahassee at its Municipal Airport over which the city had jurisdiction. He mentioned incidents of the previous night and

fears of more unrest. He then commanded them in the name of the state and city to immediately and peaceably disperse, and explained that such meant from the airport property. He then added that failure to so disperse would result in arrest for unlawful assembly. Collier asserted that they were interstate passengers, to which Messer replied that he did not consider them to be bona fide passengers in view of their reservation cancellations.

Several local sympathizers with the appellants dispersed, but appellants failed to do so. After about 1½ minutes, Mr. Messer turned to the Chief of Police and remarked "Chief, you can carry out your orders." The appellants were arrested and taken into custody.

The appellants take the view that the segregation practices with regard to waiting rooms, rest room facilities, and restaurant or eating facilities at the airport were violative of constitutional guarantees of equal protection of the law. They would also inject into the case the installation of sandwich and cigarette machines, at or just prior to their arrival, which inflated the prices of merchandize vended to double what it had been. The closing of the restaurant on the day of their arrival and its opening shortly after their departure is viewed as an important factor.

These facts are, in the view of this Court, not at all significant in the legal problems involved in the charge against the appellants and the disposition of such charge by the trial court.

The municipality of Tallahassee operates in a proprietary capacity and in a governmental capacity. Among its proprietary functions is the ownership and operation of a municipal airport and supervision over the concessions

there. Assuming, but not deciding, that its policies of segregation of the races in its facilities are unlawful and did constitute a violation of some duty to the appellants if enforced against them, and further assuming, without deciding, that the closing of the restaurant under the circumstances violated some duty to them, do such circumstances justify a concerted protest demonstration by appellants of their views and convictions over a protracted period of time during which tensions and tempers rise in the community which threaten to erupt into disorder and thus render the city, in its governmental capacity, powerless to terminate the demonstration in the exercise of its police power?

Stated another way, may not a lawful assembly for the purpose of protesting and demonstrating opposition to a course of policy practiced by the municipality become an unlawful assembly when pursued to unreasonable lengths imposing unreasonable burdens on others, after the lawful objectives of the demonstration had been fairly accomplished?

It is fundamental that our constitutions accord to the citizen of the United States the right of freedom of speech and of assembly and to peaceably petition for a redress of grievances. Such freedoms are jealously guarded and when exercised in good faith and in good order may not be lawfully interfered with by governmental action. However, it is not a license to take into one's own hands the enforcement of law or by excessive harassment, effect coercion and acceptance of one's convictions and interpretations of legal rights by governmental entities whose policies are in conflict. Such procedures wholly ignore the very machinery provided by the constitutions and laws of the nation and state for the declaring, securing and enforcement of constitutional and other

legal rights. It is the courts, both state and federal, to whom resort is readily available for citizens to seek recognition and enforcement of legal rights and immunities. That such courts may not move as swiftly as the individual would wish does not authorize pursuit of personal means which unnecessarily create or threaten public disturbance or disorder, or which substantially interfere with normal, orderly functions of a public facility.

Such a procedure is a form of anarchy which, if it becomes an accepted practice, can have only the effect of seriously weakening orderly government.

The appellants, prior to the reading of the riot act to them, had achieved their announced objectives. They had observed both at the bus station and the airport the integration or lack of it of the waiting room, rest room and restaurant facilities. They had very effectively borne witness as clergymen and otherwise of their sympathy with the struggle to obtain desegregation of the various facilities of interstate travel.

To accomodate and facilitate these legitimate objectives the law enforcement agencies of city, county and state had given protection against potential violence or other disorder from groups or individuals who resented the activities of the appellants. This protection was afforded at the bus station, at the airport on the afternoon of June 15, on the evening of June 15 when the appellants left the airport to come into town and on the following morning when they returned to the airport purportedly to take an early plane. However, instead of using the reservations they had obtained they made a cancellation. This was thrice they had made last minute cancellations of reservations for the sole reason that they wished to eat in the

restaurant, which was closed. In the meantime their conduct and persistence was arousing increased resentment and anger in the community with threats of violence and disorder toward the appellants.

Obviously, the conduct of appellants had revealed a pattern. They would make reservations for travel, wait in the lobby until just before the plane they were scheduled to take arrived and then cancel, make reservations on a later flight and then again cancel at the last minute, at all times remaining in the airport but never taking a plane. The effect is obvious. The seats and other facilities are occupied by them and their use denied to those who actually wished to travel. The use of rest rooms and wash rooms by them partakes more of lodging than a comfort feature for those whose sole purpose is some airport business. The reservation of space and last minute cancellation prevented the use of that space of the flights involved, resulting in loss and inconvenience to the air line involved and probable denial to other would-be travelers of the use of that space. The sole purpose of such a course of harassment was to goad the municipality and its restaurant lessee to open the restaurant and gratify the appellants' wishes that they be served in the style and manner they deemed to be their right.

Controversies between citizens and governmental units are not unique. In nearly every instance there is a conflict in what the citizen contends he has a right to claim and the governmental entity which would deny the validity of such claim. The citizen may freely express his views and seek to cultivate converts to them with a view of bringing moral or political pressures on the officers of the public body to accord his demands. However,

such means must be exercised in a manner that is reasonable and not harmful to the rights of others or the peace and good order of the community. Especially is this true when the controversy is one of public interest in which there are strong and emotional feelings on the part of a substantial number of persons in the community.

The courts, both state and federal, are open to resolve controversies on constitutional issues in duly instituted and processed civil actions. Indeed, the very issue in the demonstrations of the appellants was subsequently presented to and adjudicated by the United States District Court for the Northern District of Florida. Brooks, et al v. Tallahassee, 202 Fed. Supp. 56. When citizens press their demonstrations in behalf of a cause (however worthy they deem their objectives to be) beyond the bounds of/delivering their message fully and effectively and reach the stage that they materially and harmfully interfere with the orderly business and lawful activities of others, who are acting in public or private capacities, then the conduct is disorderly and assembly for carrying it out is unlawful. Such was the case here.

The judgments appealed from are hereby affirmed.

Affirmed.

BEN C. WILLIS
Circuit Judge

LAW OFFICES

SIMON & ROSEN

TOBIAS SIMON
MAURICE ROSEN

RECEIVED
AUG 24 1962
VLADECK & ELIAS

706 AINSLEY BUILDING, 14 N. E. FIRST AVENUE
MIAMI 32, FLORIDA
TELEPHONE FR 9-5687

August 22, 1962

PLEASE REPLY NUMBER:

Carl Rachlin, Esq.
280 Broadway
New York City, New York

Dear Carl:

Enclosed please find the copies of the pertinent orders in the matters of Dressner, et al, vs City of Tallahassee.

We are prepared to proceed at once with an appeal. Are we in a position to ascertain whether or not CORE will be able to pay the expenses.

Please advise.

Sincerely,

TOBIAS SIMON

TS:ev

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.

AT LAW.

NO. 10085

PRISCILLA O. STEPHENS,

Appellant,

vs.

CITY OF TALLAHASSEE,

Appellee.

A P P E A L

ORDER OF REMOVAL

The appellant, Priscilla O. Stephens, was charged in the Municipal Court of Tallahassee, Florida with two offenses, namely, unlawful assembly, and resisting arrest. Upon trial of the case she was acquitted of the charge of unlawful assembly, but was convicted of resisting arrest,[1] and sentence was imposed. In addition, the trial judge revoked a suspension of sentence and probation which had been rendered in an earlier case in which there had been a conviction of another offense. The earlier conviction and sentence had been pronounced on February 20, 1961. Upon revocation of such probation and suspension, the original sentence was directed to be executed, in addition to the punishment assessed in the case just tried.

An appeal was undertaken to the Supreme Court of Florida, but that court, pursuant to motion to dismiss which was construed as a motion to transfer, caused the case to be transferred to this court. Stephens v. City of Tallahassee, 134 So. 2d 4.

The record shows that the appellant was in the Tallahassee Municipal Airport on June 14, 1961 at the time that several of her friends and associates were

1. The trial judge apparently considered the charge as stating two separate offenses, namely, (1) interfering with a police officer in the discharge of his duties, and (2) resisting arrest. However, he pronounced only one judgment and sentence. Actually there was but a charge of a single offense which would be fully embraced in the term "resisting arrest".

engaged in a demonstration which has since been adjudged an unlawful assembly. See Dreamer, et al v. City of Tallahassee (Law 1006k, Circuit Court of Leon County--Appeal from Municipal Court of Tallahassee). While there, a city official and special police officer read a proclamation commanding appellant and all others engaged in the demonstration to disperse, pursuant to F. S. 870.04. The appellant, unlike some of the others, obeyed the command. However, the others who refused to disperse were ordered to be arrested. The appellant was approached outside the terminal building by a police officer who was under the misapprehension that appellant had also refused to disperse along with the others. She was told that she was under arrest and to enter a waiting vehicle. She protested her innocence and displayed some rather mild resistance to being forced into the vehicle. This resistance was shortly and without violence overcome and she was taken into custody.

As above noted, she was found innocent of the charge of unlawful assembly. It was for this alleged offense that her arrest was made. The officer making the arrest was not armed with a warrant and at the time of the arrest appellant was not engaged in the commission of any offense. The officer obviously was acting under the mistaken concept that a municipal offense had been committed in his presence so as to authorize the arrest. No felony had been committed or even suspected. No warrant of any kind had been issued. There was no ground, under F. S. 901.15, for the arrest to have been made by the officer who made the arrest. Therefore, the arrest was unlawful.

A person has the legal right to resist an unlawful arrest. 37 Fla. Jur. (Arrest, Sec. 19); Alday v. State, 57 So. 2d 333 (Fla. 1952); Day v. State, 147 Fla. 699, 3 So. 2d 514 (Fla. 1941); Habersham v. State, 41 Fla. 156, 29 So. 515 (Fla. 1901). An officer making an unlawful

arrest, bona fide, under color of legal authority, has committed but a trespass. Roberson v. State, supra, citing with approval Calvin v. State (Tenn.) 6 Caldwell 283. Such a trespass, like other trespasses, may not constitute an aggravated provocation so as to justify an unnecessarily violent response in the form of resistance. However, no such excessive response is shown to have occurred, and the remonstrance and conduct of appellant was clearly within the scope of lawful conduct on her part.

Accordingly, the conviction and judgment under review here is not supported by the evidence, and the same is hereby reversed and the cause remanded to the trial court for the entry of a judgment of acquittal.

Though the revocation of suspension of sentence and of probation is another cause, hereinbefore mentioned, is not directly before this court, it is apt enough to make note that if the trial court was persuaded to take that action because of the general circumstance of the subsequent commission of the offense charged in this case, the conviction of which is herein reversed, then the trial court would undoubtedly desire to reconsider its action in that matter.

Reversed. This_____day of August, 1962.

_____

WM. C. WELCH
Circuit Judge

LAW OFFICES

TOBIAS SIMON

INGRAHAM BUILDING ANNEX
223 SOUTHEAST FIRST STREET
MIAMI 32, FLORIDA
TELEPHONE FRANKLIN 7-4627

PLEASE REPLY NUMBER:

January 25, 1963

RECEIVED
JAN 22 1963
VLADECK & ELLIS

Carl Rachlin
280 Broadway
New York City, N.Y.

RE: Dresner

Dear Carl:

As of this writing, I have a deficit in my account of $198.92 on behalf of the Dresner case. It is essential that this be refunded immediately.

Sincerely,

TOBIAS SIMON

TS:ev

Enclosure

P.S. Enclosed please find the new complaint in the Kenon case, as also a statement as to the expenses incurred to date. I have secured the okay from the Civil Liberties Union to underwrite a part of these expenses, but I would appreciate receiving some money from you immediately for a portion.

Dear Toby
Thank you for your letter of the 21st
with enclosure. Your enclosure
was a statement to Richard Haber, Esq.

January 29, 1965

Tobias Simon, Esq.
Ingraham Building Annex
325 Southeast First Street
Miami 32, Florida

Re: Dresner

Dear Toby:

Thank you for your letter of the 25th and the enclosures.

I am sending your statement to Richard Haley of CORE, who has charge of such matters, for payment.

Regards.

CR:cer

CARL RACHLIN

cc: Mr. Richard Haley

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON 25, D. C.

RECEIVED
APR 22

April 15, 1963 VLADECK & ELIAS

RE: DRESNER, ET AL. v. CITY OF TALLAHASSEE,
No. 585, OCT. TERM, 1962

Dear Sir:

The Court today entered the following order in the above-entitled case:

> The petition for writ of certiorari is granted. Counsel are directed to brief and argue, in addition to the merits, the question of whether the judgment is supported by adequate state grounds.

You are advised, as provided by Rule 41, that this case will not be reached for argument until next term, and accordingly, petitioners' brief will not be due until next August 25th, or thirty days after receipt of the printed record, whichever date is later.

Very truly yours,

JOHN F. DAVIS, Clerk
By

E. T. Lyddane,
Assistant Clerk.

[illegible] Simms, Esq.
[illegible] Southeast First Street
[illegible] 32, Fla.

AIRMAIL

April 16, 1963

Tobias Simon, Esq.
223 Southeast First Street
Miami 32, Florida

Dear Toby:

Congratulations on certiorari being granted in the Dresner case. I am most anxious to assist you in this matter and will be glad to come to see you to work out plans for the brief.

I assume that you wish to argue the case yourself. If not, let me know and I will be pleased to do so.

Sincerely yours,

CR:cr

CARL RACHLIN

April 22, 1963

Tobias Simon, Esq.
223 Southeast First Street
Miami 32, Florida

Dear Toby:

On Friday, May 3, I am flying from New Orleans to Miami on National Airlines flight No. 28, leaving New Orleans at 8:15 A.M. and arriving in Miami at 10:45A.M.

As soon as my plane reaches the airport, I will take a bus or cab and come directly to your office. I will be at your service for as long as you wish and can meet with any people you think important.

I look forward to seeing you.

Best regards,

CR:cr

CARL RACHLIN

CLAUDE PEPPER LAW OFFICES
WASHINGTON FEDERAL BUILDING
1701 MERIDIAN AVENUE
MIAMI BEACH 39, FLORIDA

JEFFERSON 2-4853

CLAUDE PEPPER
JAMES C. CLEMENTS (1896-1951)
ALLEN CLEMENTS, JR.
ALFRED I. HOPKINS
ALBERT E. HARUM
EDWARD F. MITCHELL
ADELE T. WEAVER

OFFICES:
WASHINGTON, D. C.
TALLAHASSEE, FLORIDA
CORAL GABLES, FLORIDA

May 31, 1963

Tobias Simon, Esq.
223 Southeast First Street
Miami 32, Florida

Dear Toby:

Enclosed find two copies of draft of Brief for the Petitioners in Dresner v. Tallahassee. One copy is to be sent to Carl Rachlin, together with the transcript. Please request Carl to review same as soon as possible so that we may file our printed Brief at an early date and thus be in a position to have early argument in the case.

There are a few changes I shall want to make in the Brief as soon as I have your comments and Carl's, namely:

(1) I may eliminate the reference to the rights of national citizenship;

(2) The Fifth Circuit Court of Appeals decided on a case on May 15 involving CORE, which according to Law Week dealt with the question of unlawful assembly where the defendants were peaceful and where a violent mob gathered about them. As soon as the case is reported in the Federal Reporter, I shall use and cite it in the Brief;

(3) I have not yet had a chance to proof read all the quotes nor double check all the citations. This will be done before the Brief is given to the printer; and

(4) I may want to add a final oratoricle paragraph at the end as a summation.

Please let me have your comments at an early date.

Sincerely yours,

Alfred I. Hopkins

AIH:ls

LAW OFFICES

TOBIAS SIMON

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JUN - 5 1963
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INGRAHAM BUILDING ANNEX
223 SOUTHEAST FIRST STREET
MIAMI 32, FLORIDA
TELEPHONE FRANKLIN 7-4627

PLEASE REPLY NUMBER:

June 3, 1963

Carl Rachlin, Esq.
280 Broadway
New York City, ~~Fla.~~ N.Y.

RE: Dresner, et al vs City of Tallahassee

Dear Carl:

Enclosed please find the first draft of the brief to the Supreme Court of the United States on behalf of Israel Dresner, et al; together with my last copy of the transcript of the testimony.

Will you please review the brief as quickly as possible and forward to us your notes, comments, questions, criticisms and changes. There is no pride of authorship. The sole indispensable factor in this case is that it be won; and that, quickly. There is however, pride of ownership in the last copy of the transcript of the testimony. I will hold you to account for its return to me.

With kindest personal regards.

Sincerely,

Toby

TOBIAS SIMON

TS:ev

cc: Dr. Robert McAffee Brown
Rabbi Israel Dresner
Rev. Arthur L. Hardge
Rev. Petty D. McKinney
The Rev. Robert J. Stone
Rev. John W. P. Collier
Rabbi Martin Freedman
Rev. Wayne C. Hartmire, Jr.
Rev. Ralph Lord Roy
Rev. A. McRaven Warner

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JUN 18 1963
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WASHINGTON FEDERAL BUILDING
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ADELE T. WEAVER

OFFICES:
WASHINGTON, D. C.
TALLAHASSEE, FLORIDA
CORAL GABLES, FLORIDA

June 17, 1963

Carl Rachlin, Esq.
280 Broadway
New York City, New York

Dear Carl:

I should very much appreciate your comments on the draft brief in the Dresner case as soon as possible as I should like to put the brief in final form and send it to the printer. I should also like to have the transcript returned as soon as possible so that I can check out a few items that need to be gone over.

With best wishes, I am

Sincerely,

Alfred I. Hopkins

AIH:is

June 16, 1965

Alfred I. Hopkins, Esq.
Claude Pepper Law Offices
1701 Meridian Avenue
Miami Beach 39, Florida

Dear Alfred;

I have been involved in a terribly long trial at the National Labor Relations Board. Some of the attorneys in this office have already gone over your brief.

One thing that I want very much to do is to attempt to rewrite the statement of facts so that everything may be included but in a much shorter space. I think we are faced with a situation where the Supreme Court having had so many cases recently, will not approve of an overly long statement of the facts.

I will have some suggestions for your attention in a very short period of time. Please bear with me.

Sincerely,

CR:ew
cc: Tobias Simon, Esq.

CARL RACHLIN

July 2, 1963

Alfred Hopkins, Esq.
c/o Hon. Claude Pepper
Washington Federal Building
Miami Beach 39, Florida

Dear Alfred:

I enclose my annotation of the Statement of Facts in the draft of your brief in Dresner et al vs. City of Tallahassee. You will note that what I have done mainly is to cut down on the Statement of Facts. It is my most firm belief that a short Statement of Facts is important. The Court has been hearing lots of cases involving related problems. Therefore, it is not as essential to give them an expanded education.

This case has certain factual similarities with Garner vs. Louisiana, Taylor vs. Louisiana, and Edwards vs. South Carolina, and the Statement of the Facts should be, as they quite properly can be in this case, kept within the framework of those cases. The Court doesn't need extended discussion of the facts any longer.

On the other hand, and from the Court's opinion on the Petition for Certiorari, it seems that they are greatly concerned with the Florida procedural question, and I wonder whether there should not be a little more in the facts concerning the procedural problem since it takes on some of the aspects of the factual problem.

Please forgive me but I have not been in my office for two weeks, until today. I had your brief with me, and in order to save time I give you my notes embodied on your draft. You will have the rest in a day or so.

In light of the identification of CORE with this case, I think it most important, and I urge it most strongly, that I be associated with you and Toby and Howard on this brief. It may well be advisable that we meet in the very near future to discuss some of these questions, and I would be pleased to come down to your office for the purpose of saving time and putting the brief into final form.

With kindest regards,

Sincerely yours,

CARL BRAUN

CB:rp
cc: Fabian Simon, Esq.

CLAUDE PEPPER LAW OFFICES
WASHINGTON FEDERAL BUILDING
1701 MERIDIAN AVENUE
MIAMI BEACH 39, FLORIDA

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ALBERT E. HARUM
EDWARD F. MITCHELL
ADELE T. WEAVER

OFFICES:
WASHINGTON, D. C.
TALLAHASSEE, FLORIDA
CORAL GABLES, FLORIDA

July 2, 1963

Carl Rachlin, Esq.
280 Broadway
New York 7, New York

Dear Carl:

I now have the printed record in the Dressner case and I am ready to finalize the brief and give it to the printer. Accordingly, would you please let me have your comments just as soon as possible.

With best wishes, I am

Sincerely yours,

Alfred I. Hopkins

AIH:is

CLAUDE PEPPER LAW OFFICES
WASHINGTON FEDERAL BUILDING
1701 MERIDIAN AVENUE
MIAMI BEACH 39, FLORIDA

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JAMES C. CLEMENTS (1896-1951)
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ALFRED I. HOPKINS
ALBERT E. HARUM
EDWARD F. MITCHELL
ADELE T. WEAVER

OFFICES:
WASHINGTON, D. C.
TALLAHASSEE, FLORIDA
CORAL GABLES, FLORIDA

RECEIVED
JUL 10 1963
VLADECK & ELIAS

July 8, 1963

Carl Rachlin, Esq.
280 Broadway
New York 7, New York

Dear Carl:

I plan to be in New York City on Tuesday, July 16, and this should provide us with an opportunity to discuss the Dresner case.

I have an appointment at 10:00 in the morning with Jack Greenberg of NAACP to discuss certain sit-in cases which we both have pending before the Supreme Court. I think that conference will consume the entire morning, and I should like to be able to see you in the afternoon, say around three o'clock. If this is convenient, I would appreciate your letting me know. I can call you the first thing Tuesday morning to let you know I have arrived. I shall study all of your comments on the Dresner brief.

With best wishes, I am

Sincerely yours,

Alfred I. Hopkins

AIH:is

Dec 1, 1963

Dear Alfred re: Dresden

I have just come back from a dinner at the N.Y. Yacht Club and found your letter. I have checked with the U.S. Supreme Court. The briefs are due on August 21 st., as mine were October 21, 1963. You will be hearing from me shortly. Please be patient. I am but

Regards Carl

CLAUDE PEPPER LAW OFFICES
WASHINGTON FEDERAL BUILDING
1701 MERIDIAN AVENUE
MIAMI BEACH 39, FLORIDA

JEFFERSON 2-4853

CLAUDE PEPPER
JAMES C. CLEMENTS (1896-1951)
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ALFRED I. HOPKINS
ALBERT E. HARUM
EDWARD F. MITCHELL
ADELE T. WEAVER

OFFICES:
WASHINGTON, D. C.
TALLAHASSEE, FLORIDA
CORAL GABLES, FLORIDA

Feb Release

July 25, 1963

Carl Rachlin, Esq.
280 Broadway
New York, New York

Dear Carl:

You will find enclosed a copy of the final draft of my brief in the Dresner case.

I have not yet double checked all the citations to make sure they are correct and a few citations are still incomplete.

In addition, I have not completed the references to the record and to do this I also need the typed transcript which you have in your office, so that I may compare the pages cited in the state court brief with the pages set forth in the printed record. As to the question of "adequate state ground", I have discussed the matter fully with Toby and we are both of the opinion that the Court is not concerned with the procedural question but they are concerned solely with the substantive issue as to whether or not the elements of unlawful assembly were made out by the City at the trial. In any event, the procedural question was fully briefed by Toby in his reply brief in connection with the petition for certiorari.

I should appreciate it if you would let me have your views and the typed transcript within the coming week so that I may give it to the printer.

I certainly enjoyed meeting and talking with you when I was in New York, and all of your suggestions as to brevity were certainly well taken.

With best wishes, I am

Sincerely yours,

Alfred I. Hopkins

AIH:is

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

NO. 35

ISRAEL DRESNER, AUSTIN M. WARNER,
ROBERT M. BROWN, PETTY D. McKINNEY,
MARTIN FREEDMAN, ARTHUR L. HARDGE,
ROBERT J. STONE, WAYNE C. HARTMIRE,
J. W. COLLIER, JR., RALPH L. ROY,

Petitioners,

v.

CITY OF TALLAHASSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT IN AND FOR
LEON COUNTY, FLORIDA

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the court below, the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida (hereinafter referred to as the Circuit Court), affirming Petitioners' convictions by the trial court, is not reported, but is set forth in full in the Record (R. 156).

JURISDICTION

The judgment of the Circuit Court was entered on August 16, 1962 (R. 156). The Petition for Writ of Certiorari was filed herein on November 13, 1962, and the Petition was granted by this Court on April 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Article V § 6(3) of the Constitution of the State of Florida provides that the Circuit Courts shall have final appellate jurisdiction of all cases arising in municipal courts. Petitioners

were convicted by the Municipal Court of the City of Tallahassee, Florida, and the convictions were affirmed by the Circuit Court. As pointed out in the Petition for Writ of Certiorari and in Petitioners' Reply Brief filed herein, the Circuit Court is the highest court of the State of Florida in which a decision could be had within the meaning of 28 U.S.C. 1257.

QUESTION PRESENTED

Where a group of Negro and white clergymen, travelin interstate commerce, gather at a municipaly owned and operated airline terminal building, with the publicaly announced purpose of determining whether the restaurant and other facilities in the building are racially unsegregated; and where the facilities are in fact segregated in favor of white persons only; and where a crowd gathers outside the terminal building and voices belligerent objection to the clergymen's views and purposes; and where the clergymen do not utter words of incitement or interfere with any business of the terminal; and where the police arrest the clergymen for unlawful assembly, but arrest no one in the hostile crowd; did the subsequent convictions for unlawful assembly constitute (1) a denial of due process of law; (2) an abridgement of freedom of speech and freedom of assembly; (3) a violation of the interstate commerce clause; and (4) a denial of the equal protection of the laws?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 1 of the Fourteenth Amendment and the Interstate Commerce Clause of the Federal Constitution.

2. Article V, § 6(3) of the Florida Constitution, which provides, in pertinent part, that:

"the Circuit Courts . . . shall have final appellate jurisdiction . . . of all cases arising in Municipal Courts . . . "

2. Florida Statutes, § 870.04, which provides in pertinent part as follows:

"If any number of persons, whether armed or not, are unlawfully, riotously or tumultously assembled in any county, city or municipality . . . xtixexnixexmxfxnxexmxixxexmxexpxnxexmxexnxexmxexnxexmxixm xexmxjxnxtixmxexfxtixexpexaxexnxexmxixexmxexuxnxtxexnxexm xaxexnxexmxexmxexmxexuxnxixexmxexnxexmxexmxexixnxexmxexm . . . police officer /xexmxexixexfxtixexFlexrxixdaxixgixm xaxpxaxnxexm, shall go among the persons so assembled, or as near to them as may be with safety, and shall in the name of the State command all the persons so assembled immediately and peaceably to disperse; and if such persons do not thereupon immediately and peaceably disperse, said officers shall command the assistance of all persons in seizing, arresting and securing such persons in custody . . . ."

4. Florida Statutes § 332.08(3), which provides in pertinent part that:

"In exercising the general powers granted herein, a municipality which has established or may hereafter establish . . . airports, . . . /or which has acquired or set apart or may hereafter acquire or set apart real property for such purposes, is hereby authorized . . . to confer the privileges of concessions of supplying upon its airports goods, commodities, things, services, and facilities; provided, that in each case in so doing the public is not deprived of its rightful equal and uniform use thereof."

5. § 28-38 of the 1957 City of Tallahassee Code, which provides as follows:

"It shall be unlawful for any person to commit, within the corporate limits of the city, any act which is or shall be recognized by the laws of the state as a misdemeanor, and the commission of any such acts is hereby forbidden." (R. 157)

STATEMENT OF THE CASE

This appeal is from a conviction of Petitioners for unlawful assembly. The City of Tallahassee charged that on June 16, 1961 the Petitioners unlawfully assembled in the Tallahassee Municipal Airport in that they "met together to commit a breach of the peace, acting together and concertedly to occupy and to continuously occupy certain chairs and seating facilities in the Tallahassee Municipal Airport, making and cancelling group airline reservations on the two (2) operating airline schedules departing Tallahassee on the said date, and on June 15, 1961, and meeting together in concert attendant with circumstances calculated to excit alarm, endanger the public peace and excite fear, and in such nature as to inspire well-grounded fear in persons of reasonable courage, of riot, or other breaches of public peace", and that while so assembled a police officer went among them and commanded them to disperse, and they refused to obey the officer's command. (R. 1)

The charge was made and the convictions were had pursuant to § 23-38 of the 1957 City of Tallahassee Code, which incorporated by reference the State unlawful assembly statute, Florida Statutes, § 870.04, supra. (R. 157)

Petitioners were tried in the Tallahassee Municipal Court on June 22, 1961. The trial court denied Petitioners' several motions to quash and dismiss the charges (R. 4; 75), found the Petitioners guilty of unlawful assembly, as charged, and ordered them to pay fines of $500.00 each or alternatively to serve sixty days each in the city jail. (R.144) Petitioners thereupon filed an appeal to the Supreme Court of Florida, which Court ruled that it lacked jurisdiction to entertain the appeal and transferred the cause to the Circuit Court, (R. 153) which subsequently affirmed the judgments of the Municipal Court. (R. 156)

Petitioners, comprising a party of Negro and white clergymen, had set forth together from Washington, D.C. to cities in several southern states for the purpose of determining whether certain interstate transportation facilities were available on an integrated basis for Negroes, and to publicly identify themselves with those groups opposed to practices of racial segregation (R.).

Petitioners left Washington, D.C. by bus and traveled to Tallahassee, Florida, passing through the states of Virginia, North Carolina, South Carolina, and Georgia en route (R.). Petitioners arrived at the Greyhound bus terminal in Tallahassee on June 15, 1961 and were met by a hostile crowd of persons who resented their presence and the purpose of their trip and who threatened them with mob violence. However, Petitioners were protected from this crowd by the local police at the bus terminal (R.). Meanwhile, Petitioners procured airline tickets for their return trip to their final destinations at New York City, ~~xmxmxmxm~~, and Newark, New Jersey (R.), and left the bus terminal for the Tallahassee municipal airport preparatory to embarking upon their return flight, arriving there in the early afternoon of June 15, 1961 (R.).

Upon their arrival at the airport, Petitioners were met by another hostile crowd, which also voiced belligerent objection to their presence and to the purpose of their trip and threatened them with violence (R.). A large number of police officers were present, and they formed a cordon around the airport terminal building to separate the hostile crowd from the Petitioners (R.).

When they arrived at the airport terminal building, Petitioners sought to be served food and drink at the restaurant located therein and which was publicly designated for the use of white persons only. They discovered, however, that this restaurant was closed (R.). Petitioners then waited for the restaurant to re-open and in that connection cancelled their reservations for their return trips scheduled for that evening and made new reservations for the following morning. They waited in the terminal building until approximately 11:00 P. M. that evening and then left without having obtained any restaurant service. (R.).

On the following morning of June 16, 1961, Petitioners returned to the airport and while waiting in the terminal building for their return flight again sought service in the restaurant (R.). However, the restaurant was still closed and Petitioners again cancelled their reservations and made new reservations for their return flights for later that day. Again a large, hostile crowd gathered at the airport and again a police cordon was formed separating

the crowd from the Petitioners (R.). While Petitioners were thus seated in the terminal building and awaiting the opening of the restaurant, the City Attorney accompanied by the Chief of Police and other police officers, approached the Petitioners, and read to them a proclamation which commanded that they disperse immediately or else they would be arrested for unlawful assembly (R.)

Petitioners declined to disperse, and they were thereupon arrested by the police and taken into custody (R.).

Within the Airport terminal building, which is owned and operated by the City of Tallahassee (R.), there are two eating establishments. The restaurant mentioned above is a glass-enclosed dining room, which was conspicuously designated for the exclusive use of white persons; the other is a small lunch counter which was conspicuously designated for the exclusive use of Negroes (R.). There were also separate and segregated waiting rooms for Negro and white passengers, and separate and segregated rest-rooms in the terminal building (R.). The restaurant facilities are leased by the City to The American News Company, Inc., a Delaware corporation, pursuant to a lease dated October 20, 1960 (R.). The manager of the restaurant testified that Negroes were never served in the glass enclosed dining room (R.).

Petitioners' conduct was peaceable at the time of their arrival in Tallahassee, during the time they were at the bus terminal, while they were at the airport terminal, and at the time of their arrest, and at all times material to this cause they were quiet, dignified and polite in their words and acts. The station manager of Eastern Airlines at the Tallahassee airport, testified that:

> "They were very polite and very cooperative asking for what they wanted and how they wanted it."(R.)

The Chief of Police testified that they were merely sitting in the white waiting room and that he did not see them creating a disturbance. (R.)

A police lieutenant ~~James Bennett~~ testified that he did not hear any of the Petitioners make any threats (R.). The Petitioners

themselves testified that they were peaceable. Rev. J. W. Collier, Jr. testified as follows:

"Q During the period of time that ensued from the moment you first arrived at the airport until that time will you describe your conduct to the Court?

"A We sat in the lobby, in the waiting room; we read the newspapars; we read books which members of our party had with us and we quietly conversed among us.

"Q Were you loud, noisy or boisterous in any manner?

"A At no time in any way.

"Q Did you at any time threaten any person or persons?

"A We did not." (R.)

All of the Petitioners are men of the cloth. (R.)

Contrasted with the conduct and character of the Petitioners, was that of the crowd gathered outside the airport. The Chief of Police gave the following testimony:

"A It was generally talked around the terminal that there was possibly going to be some violence if the defendants continued to stay there." (R.)

* * * *

"Q Mr. Stoutamire, the question was rather long, but, in effect, it was did you have reason to believe that the continued presence of the defendants at the airport building would tend to incite a riot, cause a disturbance and disorderly conduct?

* * * *

"A I did, based on the facts that on Thursday night, what happened there then, and what the defendants requested, that they be protected and that they had requested protection the following morning back to the airport and when I got there with the Freedom Riders they there asked if I would give them protection while they was there." (R.)

* * * *

"A As I stated before the publicity that has been

in the newspapers and on radios prior to them coming to Tallahassee about what had happened in other towns, the newspapers and radios that was giving the information that they would be here at a certain time, people in my opinion in the City and in the County was somewhat enraged about the fact that they were coming." (R.)

The police lieutenant testified to the same effect. (R.), and the State Attorney also testified that:

"From talking to the people there and seeing the scene I knew that those people outside would have given trouble if the officers had not been present to take care of the situation." (R.)

Notwithstanding the foregoing, however, the police made no effort to disperse this crowd (R.), and arrested no one in the crowd (R.).

The Petitioners were at all times material to this cause passengers in interstate commerce and at all times material to this cause possessed interstate airplane tickets and reservations (R.).

As noted above, the announced purpose of the Petitioners' trip was to determine what facilities were available to Negroes on an unsegregated basis in the several transportation terminals they visited during the course of their trip and make known their opposition to racial segregation in such facilities. Thus Petitioner Collier testified:

"A There was a two-fold purpose: First, we wanted to ascertain whether or not there were facilities available on an integrated basis to interstate passengers in waiting rooms, in rest rooms, in eating facilities in the terminals through which we would pass.

"Secondly, we wanted to bear our witness as ministers, rabbis, and clergymen to the struggle to obtain these rights guaranteed us by the Constitution." (R.)

Petitioners Dresner, Freedman and Hartmire all testified

to the same effect. (R.).

Notwithstanding the fact that the airport and the terminal building located thereon are owned and operated by the City of Tallahassee, the city and its lessee jointly maintain a policy of racial segregation in the restaurant facilities (R.), and the lunch counter available to Negro passengers was an admittedly unequal facility (R.). Moreover, these eating facilities were segregated notwithstanding the fact that the restaurants together with the restrooms and waiting rooms, all formed an integral part of the airport terminal building (R.).

Although the white restaurant had been open and serving the white public prior to the Petitioners' arrival, it was closed during the entire time the Petitioners were in the terminal building and did not reopen until the Petitioners had left. Both the restaurant manager and the city manager testified that the restaurant was closed for two reasons: first, to repair certain refrigeration equipment, and secondly to avoid possible violence (R.).

SUMMARY OF ARGUMENT

1. The City failed to present evidence establishing the requisite elements of the offense of unlawful assembly; hence the convictions, without evidence, violated due process of law. Further, since there was no evidence of unlawful assembly, there was no adequate state ground for the convictions. Petitioners' conduct was peaceable at all times, and they uttered no words of incitement. The fact that others in the vicinity violently resented their objectives and sentiments regarding desegregation does not justify the convictions of unlawful assembly. Further, even though the Petitioners were in a public building, there is no evidence that they interfered in any way with business or activities of the terminal building, the airlines, or any other passengers.

2. On the other hand, even assuming that the judgments of the Municipal Court and the opinion of the Circuit Court establish that under Florida law the offense of unlawful assembly was made out in the circumstances of this case, the convictions would necessarily be in violation of freedom of speech and freedom of assembly as

guaranteed by the due process clause of the Fourteenth Amendment. Petitioners assembled peaceably within the terminal building to protest illegal conduct by the City and the lessee-restaurant within the terminal building itself, i. e., their policies of racial segregation, and did so without interfering with the normal business of the terminal building, or the airlines, or other passengers. Consequently, Petitioners' conduct cannot be said to have presented a clear and present danger of any substantive evil, or to any substantial interest of the City, which could have justified such a denial of freedom of speech and assembly. Moreover, the fact that Petitioners' peaceable conduct, which protested the illegal practices of the City and its lessee may have been the reason for the gathering of a hostile crowd, did not warrant their arrest and convictions, since Petitioners did not utter any words of incitement.

3. Since there was no carefully drawn city ordinance providing reasonable times for assemblies of persons within the terminal building, Petitioners had the right to so assemble there (a) so long as they did not interfere with the facilities of the terminal building, or the airlines, or other passengers; (b) since they all had flight reservations, and therefore legitimate business, in the terminal building; and (c) since the terminal building itself was the very locus of the unlawful racial segregation which the Petitioners were protesting.

4. The arrests and convictions herein constituted an undue burden on interstate commerce in that the City unlawfully interfered with Petitioners' rights of peaceful and unfettered travel in interstate commerce.

5. The actions of police and city officials in arresting and convicting Petitioners, who were peacefully demonstrating against unlawful segregation and who were peacefully seeking unsegregated food service, and in failing and refusing to arrest a single person in the violent mob outside the terminal building, discriminatorily applied the City ordinance and the Florida unlawful assembly statute and thus denied Petitioners the equal protection of the laws.

ARGUMENT

I.

Petitioners were peaceable and orderly at all times, and

hence
/ there was no evidence whatsoever to support the convictions below for unlawful assembly, and therefore / Petitioners have been denied due process of law under the Fourteenth Amendment.

As stated in the Circuit Court's Opinion (R. 157), Petitioners were charged and convicted pursuant to § 23-28 of the 1957 City of Tallahassee Code which incorporated by reference Florida Statutes, § 870.04, supra. The gravamen of the charge, of the City Attorney's proclamation, and of the foregoing statute, is the offense of unlawful assembly. The Statute does not define the offense and it does not appear that the Florida Supreme Court has ever defined it or has ever interperted this or any similar statute. Consequently, it is necessary to have recourse to the common law definition. People v. Perry, 193 N.E. 175 (N.Y., 1934). In the leading case of State v. Butterworth, 142 A.57; 58 A.L.R. 744 (N.J., 1928), the Court stated that at common law:

> "in order to constitute the offense of unlawful assembly, it must appear that there was a common intent of the persons assembled to attain a purpose, whether lawful or unlawful, by the commission of such acts of intimidation and disorder which are likely to produce danger to the tranquility and peace of the neighborhood, and have a natural tendency to inspire rational, firm, and courageous persons in the neighborhood with well grounded fear of serious breaches of the public peace." 142 A.57, 60

That case involved the arrest of some 1,500 to 2,000 persons assembled to protest alleged suppression of union activities. The Court reversed the convictions and stated that:

> "Neither of the officers related a single act or alarming circumstance done or created by any one of the defendants or of any act threatening the public peace done by any of the persons assembled there, or which was of an unusual, boisterous, or disorderly nature." 142 A.57, 60.

In the leading English case of Beatty v. Gillbanks, 47 L. T. Rep. N.W. 194; 15 Cox C.C. 138; 9 Q.B. 308 (1882), the defendants were members

of the Salvation Army, which on previous occasions had paraded through an English town and collided with an antagonistic organization known as the "Skeleton Army", and great disorder had ensued. Thereafter, and notwithstanding an official notice directing all persons to abstain from assembling to the disturbance of the public peace, defendants led another procession through the streets, and were surrounded by a "tumultuous and shouting mob of some hundred persons ". The police ordered the defendants to disperse, but they refused, and they were arrested and convicted of unlawful assembly to the disturbance of the public peace. On appeal the convictions were set aside. The Crown had contended that similar parades in the past had resulted in riots, and that the defendants knew that such would occur if they paraded again. In reply, the Court declared that:

"... everyone must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants, they would be liable, and the justices would have been right in binding them over. But the evidence set forth in the case does not support this contention; on the contrary, it shews that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them." 9 Q. B. 308, 311-312 (Emphasis supplied)

* * * *

"What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a position, and the question of the justices whether the facts stated in the case constitute the offence charged in the information must therefore be answered in the negative." 9 Q. B. 308, 312-313 (Emphasis supplied)

Accord: Reg. v. Clarkson, 17 Cox's Criminal Law Cases 483 (Eng. 1892).

The Beatty case is essentially on all fours with the case at bar, for there is not a scintilla of evidence in the record that Petitioners' conduct was anything but peaceable and orderly. Petitioners submit that it is an outrageous application of the doctrine of unlawful assembly to convict peaceable persons simply because others, who belligerently object to their presence, but who are in no way threatened with any personal or proprietary damage, threaten to become disorderly. Such has not been the law of unlawful assembly, and to so distort it in this case would be to allow a conviction to stand without evidence to support it, and in violation of due process of law. Taylor v. Louisiana, 370 U.S. 154; 8 L.Ed. 2d ; 82 S.Ct. 1188 (1962); Garner v. Louisiana, 368 U.S. 157; 7 L.Ed. 2d 207; 82 S.Ct. 248 (1961); and Thompson v. City of Louisville, 362 U.S. 199; 4 L.Ed. 2d 654; 80 S.Ct. 624 (1960). Petitioners point out that in Taylor, the Court found that there

> "was no evidence of violence"; that the record "shows that petitioners were quiet, orderly, and polite"; and that "the only evidence to support the charge was that petitioners were violating a custom that segregated people in waiting rooms according to their race, a practice not allowed in interstate transportation facilities by reason of Federal law." 370 U.S. 154, 155-156; 8 L.Ed. 2d 395, 396.

The Court will also note that the language of Florida Statutes § 870.04, supra, is directed at persons "unlawfully, riotously, or tumultously assembled." Since ~~the~~ Petitioners were not assembled "unlawfully" within the meaning of the common law as noted above, and since the record shows that they were not assembled "riotously or tumultously", the convictions which were not supported by evidence to make out the offense described by the Florida statute.

Finally, the Circuit Court in its opinion made certain assumptions about the effect of the Petitioners' conduct which are in no way supported by the record. The Circuit Court asserted that the facilities of the terminal building were denied to other persons, that the airline

was inconvenienced, and that other would-be travelers were denied space on air flights. (R. 164, 165). However, there is absolutely no evidence in the record that any persons having business in the terminal were inconvenienced or denied the use of the facilities or services of the airline, or that any other passengers were in any way inconvenienced. Certainly, as the court indicated in Garner, the Circuit Court could not take judicial notice of such presumed "facts" without violating due process of law. 7 L.Ed. 2d 207, 219.

Petitioners submit, therefore, that there was not an adequate state ground for the convictions, and that the convictions without evidence, violated due process of law.

II.

The convictions constituted a violation of Petitioners' rights of freedom of speech and freedom of assembly as guaranteed by the Fourteenth Amendment.

Even assuming, arguendo, that Petitioners' conduct could be deemed to have constituted a common law or statutory crime under Florida law, nevertheless their convictions cannot be squared with the rights of freedom of speech and freedom of assembly guaranteed by the Fourteenth Amendment. The announced purposes of their trip was to determine whether restaurant and other facilities in interstate transportation terminals were available to Negroes on an unsegregated basis, and they assembled and demonstrated peacefully to communicate their opposition to these illegitimate practices of racial segregation. Their objectives were clearly lawful, since "no State may require racial segregation of interstate or intrastate transportation facilities." Bailey v. Patterson, 369 U.S. 31; 7 L.Ed. 2d 512, 514; 82 S.Ct. 549 (1962); Turner v. City of Memphis, 369 U.S. 350; 7 L.Ed. 2d 762; 82 S.Ct. 805 (1962); Coke v. City of Atlanta, 184 F. Supp. 570 (N.D. Ga., 1960); Derrington v. Plummer, 240 F. 2d 922 (5th Cir., 1956); Henry v. Greeneville Airport Commission, 279 F. 2d 751 (4th Cir., 1960); Baldwin v. Morgan, 287 F. 2d 750 (5th Cir., 1961); Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715; 6 L.Ed. 2d 45; 81 S. Ct. 856 (1961).

Correct order of citations

Indeed, the action of the City officials and the American News Company in maintaining segregated restaurant facilities was in

blatant violation of the law of the State of Florida, viz., Florida Statutes § 332.08(3) which authorizes municipalities to:

> "confer the privileges of concessions of supplying upon its airports goods, commodities, things, services and facilities; provided, that in each case in do doing the public is not deprived of its rightful, equal and uniform use thereof." (Emphasis supplied)

If any further or final proof of the legitimacy of this Freedom Ride were needed, it was clearly provided by the case of Brooks v. Tallahassee, 202 F. Supp. 56 (1961) where, subsequent to the convictions below, suit was brought against the City of Tallahassee to enjoin any further racial segregation in the Tallahassee airport terminal itself and appropriate injunctive relief was granted by the District Court.

Since the Petitioners' objectives were legitimate and their assembly was peaceable, since there is no evidence that their assembly interfered with the normal functions of the terminal building, or the operations of the airlines, or with other passengers, can we say that they created such a clear and present danger of any substantive evil or to any substantial municipal interest which could have justified their convictions? The complaint of the Circuit Court, the Municipal Court and the City officials appears to be two-fold: (1) that there was danger of public disorder because of Petitioners' locally unpopular views on racial desegregation; and (2) that the assembly, having taken place in the airport terminal building, wrongfully interfered with the facilities of that building.

The short answer to the first objection is that absent the use of words of incitement, the mere fact that the announcement of unpopular views may provoke others to commit or threaten to commit acts of disorder in no way justifies state action in derogation of the rights of freedom of speech and freedom of assembly. Edwards v. South Carolina, 31 Law Week 4225; No. 86, October Term, 1962; decided Feb. 25, 1963; Cantwell v. Connecticut, 310 U.S. 296, 84 L.Ed. 1213; 60 S.Ct. 900 (1940); Terminiello v. Chicago, 337 U.S. 1; 93 L.Ed. 1131; 69 S.Ct. 894 (1949); De Jonge v. Oregon, 299 U.S. 353; 57 S.Ct. 255 (1937); CORE v. Douglas, F. 2d (5th Cir., 1963);

Nesmith v. Alford, decided May 30, 1960, 5th Circuit Court of Appeals, 31 Law Week 2622; Sellers v. Johnson, 163 F. 2d 855 (8th Cir., 1947); Rockwell v. Morris, 211 N.Y.S. 2d 25; aff'd 215 N.Y.S. 2d 502 (1961); Cf. Cooper v. Aaron, 358 U.S. 1, 3 L.Ed. 2d 5; 78 S.Ct. 1401 (1958).

As to the second objection, Petitioners submit that since there was no statute or ordinance in effect regulating the time, place and manner of public assemblies in the terminal building, the Petitioners, having acted and assembled peaceably and for a legal objective, had the right to assemble and demonstrate in the terminal building, since it was the very site of the evil of which they complained. In Edwards v. South Carolina, supra, the Petitioners comprised a group of 187 Negroes who had assembled on the grounds of the South Carolina State House and a crowd of 200 to 300 onlookers had collected around them. This Court stated:

> "We do not review in this case criminal convictions resulting from the even-handed application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case. See Cantwell v. Connecticut, 310 U.S. 296, 307-308; Garner v. Louisiana, 368 U.S. 157, 202 (concurring opinion). These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, not susceptible of exact definition. And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." 31 Law Week 4225,

Compare Schneider v. Irvington, 308 U.S. 146; 84 L.Ed. 155; 60 S.Ct. 146 (1939) and Kunz v. New York, 340 U.S. 290; 95 L.Ed. 280; 71 S.Ct. 312 (1951), where the Court upheld the right of speech and assembly in such public areas and municipally-owned as streets and parks.

1

In Neimotko v. Maryland, 340 U.S. 146; 84 L.Ed. 155; 60 S.Ct. 325 (1951), the appellant had been convicted of disorderly conduct for holding a meeting of Jehovah's Witnesses in a public park without a permit. There was no city ordinance regulating the use of the parks, and the Court stated that:

> "The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for or disagreement with the Witnesses or their views. The right to equal protection of the law, in the exercise of those freedoms of speech and religion are protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." 340 U.S. 146, 95 L.Ed. 267, 271.

So, in the case at bar, "the conclusion is inescapable" that the City's interference with Petitioners' assembly was the result of the unpopularity of their views. This is made eminently clear from the Trial Court's views on "public order" made at the conclusion of the trial:

> "Gentlemen, it is not my business to lecture but I want to assure you that if I thought for one minute or if the facts in this case supported the thought for one minute that you all came here on a noble, Christian purpose and had acted accordingly when instructed to vacate and leave that you would not be here. I am not attempting to change your minds about anything that you think but I wish that you would stop and think this: When you do get back/home to your respective cities that you would check the criminal rates and the prostitution rates and the racial strife as compared to what you find in Tallahassee and then when you have cleaned up your own baliwick or whatever it is, then we would welcome your suggestions.
>
> "Until that time I think you have more than you can do at home. You came here for the sole purpose of forcing your opinions and your views on

"this community. No matter how noble your reasoning sounds to you or how you have testified in this court it all boils down simply to that fact. You all have traveled a thousand miles in order to be deprived of something that you had at home already and then you get all of the United States embroiled in something."(R. 145).

III.

The arrests and convictions herein constituted an undue burden on interstate commerce in violation of interstate commerce clause of the Federal Constitution.

This Court has held that the states may not impose unreasonable restraints on passengers traveling in interstate commerce and undue burdens on such travelers have been held to be unconstitutional. Morgan v. Virginia, 328 U.S. 373; 90 L.Ed. 1317; 55 S.Ct. 1050 (1946); Edwards v. California, 314 U.S. 160; 86 L.Ed. 119; 62 S.Ct. 164 (19).

In the case at bar, Petitioners were passengers in interstate commerce, they were peaceful in their conduct at all times in the course of their travel, and the purpose of their trip was perfectly ~~legitimate~~ lawful. Certainly the City ~~here~~ had no such legitimate interest in convicting Petitioners which could have justified the restraints it imposed on their rights of peaceful and unfettered travel in interstate commerce.

Moreover, Petitioners submit that the City unlawfully interfered with their right to eat, as guaranteed to passengers in transit in interstate commerce. In Boynton v. Virginia, 364 U.S. 454; 5 L.Ed. 2d 206; 81 S.Ct. 182 (1960), the court stated that:

"Interstate passengers have to eat, and the very terms of the lease of the built-in restaurant space in this terminal constitute a recognition of the essential need of interstate passengers to be able to get food conveniently on their journey and an undertaking by the restaurant to fulfill that need."

364 U.S. 454, 5 L.Ed. 2d 206, ~~81 S.Ct. 182 (1960)~~

Here, as in Boynton, the terminal restaurant was an integral part of the terminal facilities (R.). Further, the Petitioners

testified at length as to their desire to eat at the restaurant. Petitioner Collier stated:

> "Our purpose was, inasmuch as there was time prior to the departure of the plane and since I among others had not eaten, to eat prior to leaving and to test the facilities as I indicated earlier."
> (R.)

Petitioner Collier further stated that his purpose in returning to the airport on the morning of June 16 was:

"To be served in the restaurant prior to leaving." (R.)

~~(R.)~~

Petitioners Dresner, Warner and Hartmire testified to like effect. (R.)

Petitioners contend, therefore that the City interfered with this right to eat, which for interstate passengers is a right recognized and protected by the Court's ruling in Boynton v. Virginia, supra.

IV.

The arrests and convictions herein constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

The police and city officials in arresting and convicting the Petitioners, who were peacefully demonstrating against unlawful racial segregation and who were peacefully seeking unsegregated food service, and in failing and refusing to arrest a single person in the violent mob outside the terminal building, discriminatorily applied the city ordinance and Florida Statutes § 870.04, and in violation of the principle announced by the Court in Yick Wo v. Hopkins, 118 U.S. 356; 30 L.Ed. 220; 6 S.Ct. 1064 (1886), where the Court held that:

> "The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified

The discrimination is therefore illegal, the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment." 0 8
30 L.Ed. 220, 228.

CONCLUSION

For the foregoing reasons Petitioners pray that the judgments below be reversed, that the convictions be set aside and that the charges be quashed and dismissed.

Respectfully submitted,

TOBIAS SIMON, HOWARD W. DIXON
and ALFRED I. HOPKINS
223 Southeast First Street
Miami, Florida

and

CARL RACHLIN
280 Broadway
New York, New York
Attorneys for Petitioners

By_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for the Petitioners has, pursuant to Rule 33 of the Rules of The Supreme Court of the United States, been served by mail upon EDWARD J. HILL, Attorney for Respondent, 216 East Jefferson Street, Tallahassee, Florida, this _____ day of _____, 1963.

_____

LAW OFFICES

TOBIAS SIMON

INGRAHAM BUILDING ANNEX
223 SOUTHEAST FIRST STREET
MIAMI 32, FLORIDA
TELEPHONE FRANKLIN 7-4627

RECEIVED
JUL 30 1963
VLADECK & ELIAS

PLEASE REPLY NUMBER:

July 26, 1963

Mr. Carl Rachlin
280 Broadway
New York City,
New York

RE: Dresner; Kenon; Due.

Dear Carl:

On recent date, I left in your office copies of my expenditure sheets for the three matters now being handled on behalf of the Congress of Racial Equality by Florida Civil Liberties Union attorneys. In each of these cases, a deficit has been encountered which should be eliminated immediately -- if not sooner.

In detail, these are as follows:

(1)	Dresner (Freedom Rider case)	$ 175.28
(2)	Kenon (Theatre case)	$ 156.43
(3)	Due (Theatre case)	$ 278.16
	The total due and owing to me is:	$ 609.87

Please see to it that these sums are repaid immediately.

I have requested that I be provided with a revolving fund of not less than $500.00. Under these circumstances, I can open a separate account in the name of the Congress of Racial Equality from which all checks will be drawn. I will report to you monthly or quarterly, as the case may be desired, and you can reimburse me periodically. Under these circumstances, I can more effectively work on behalf of the principles we both admire so highly.

As I have previously advised you, I do not care to be paid for the services rendered on behalf of these cases. You could not pay me enough to replace the sense of smug satisfaction I feel every time an opposing cracker lawyer is forced to believe I am really donating my time. On the other hand, the situation has shown itself, time and again, that young lawyers are needed to argue motions in the various cases in Tallahassee, Ocala, Jacksonville, St. Augustine, etc. I feel guilty taking these young men away from their work without compensation -- even of a minor source. I want express authorization to pay these young men $25.00 or $50.00 for out-of-town hearings in such manner as I feel best. Rest well assured that this is not an attempt to separate you from your hard-earned funds.

I would regard it as a matter of the greatest good faith if you will both respond to my questions and set up the funds requested as well as to repay me for the funds advanced at your most early convenience -- if not immediately.

With kindest personal regards.

Sincerely,

TOBIAS SIMON

TS:ev

LAW OFFICES

TOBIAS SIMON

INGRAHAM BUILDING ANNEX
223 SOUTHEAST FIRST STREET
MIAMI 32, FLORIDA

TELEPHONE FRANKLIN 7-4627

PLEASE REPLY NUMBER:

RECEIVED
AUG 13 1963
VLADECK & ELIAS

CORE Tallahassee

August 10, 1963

Mr. Carl Rachlin
280 Broadway
New York City, N.Y.

Dear Carl:

For heaven's sake, please take care of the enclosed bills immediately.

Sincerely,

TOBIAS SIMON

TS:ev

Encls.

CLAUDE PEPPER LAW OFFICES
WASHINGTON FEDERAL BUILDING
1701 MERIDIAN AVENUE
MIAMI BEACH 39, FLORIDA

JEFFERSON 2-4853

CLAUDE PEPPER
JAMES C. CLEMENTS (1896-1951)
ALLEN CLEMENTS, JR.
ALFRED I. HOPKINS
ALBERT E. HARUM
EDWARD F. MITCHELL
ADELE T. WEAVER

OFFICES:
WASHINGTON, D. C.
TALLAHASSEE, FLORIDA
CORAL GABLES, FLORIDA

RECEIVED
AUG 28 1963
WEADECK & WALLS

August 27, 1963

Carl Rachlin, Esq.
280 Broadway
New York, New York

Dear Carl:

Enclosed find enclosed bill for $139.78 for the printing of the brief in the Dresner case, which you said that C.O.R.E. would pay and I should appreciate their taking care of it at their earliest convenience.

With best wishes, I am

Sincerely yours,

Alfred I. Hopkins

AIH:is

encls

September 10, 1963

Mr. Richard Haley,
Assistant National Director
CORE
38 Park Row
New York 38, New York

Dear Richard:

Enclosed is the printing bill for briefs for the U.S. Supreme Court in Dresner v. Tallahassee. The bill is reasonable and I recommend it be paid.

Sincerely,

CR:cr
enc.

CARL RACHLIN

cc: Alfred Hopkins, Esq.

CLAUDE PEPPER LAW OFFICES
WASHINGTON FEDERAL BUILDING
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MIAMI BEACH 39, FLORIDA

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OFFICES:
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CORAL GABLES, FLORIDA

RECEIVED
SEP 11
WILBRICH & ELIAS

September 10, 1963

VIA AIRMAIL

Carl Rachlin, Esq.
280 Broadway
New York, New York

Dear Carl:

I received another statement from Review Printing Company in Miami for the printing of the Dresner brief and I should appreciate it if you could forward them C.O.R.E.'s check.

Thanks very much

Sincerely yours,

Alfred I. Hopkins

AIH:is

RECEIVED
SEP 25 1963
VLADECK & ELIAS

Tallahassee

LAW OFFICES

TOBIAS SIMON

INGRAHAM BUILDING ANNEX
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MIAMI 32, FLORIDA

TELEPHONE FRANKLIN 7-4627

PLEASE REPLY NUMBER:
1281-AAA

September 24, 1963

Carl Rachlin, Esq.
280 Broadway
New York City, N.Y.

Dear Carl:

I am pleased to state that I have now received from CORE the sum of $1,000.00. This has been deposited to my trust account--and will have the effect of clearing up all deficits and permit me to reimburse the costs of the most recent hearing. I will render a supplemental financial report in a short while.

The purpose of this letter is to tell you of some rather dastardly happenings in Tallahassee in recent weeks.

As you well know, Patricia Stephens Due is a veritable dynamo of energy, spirit and courage. She arranged for the demonstration against the theatres which took place Saturday night, September 14, 1963. As a consequence, more than 200 persons were arrested and jailed. The following day, the students at Florida A & M began to demonstrate at the jail. Their avowed purpose was defiance -- and they stated they would fill the jails to contest the illegal jailing of their friends the preceding evening. For a number of hours, the demonstrations were peaceable and orderly, and were satisfactory to a number of the local ministers. At one point, however, the Sheriff suggested that the demonstrations had gone on long enough. The ministers regarded the request for a termination as reasonable, and conveyed this to the students. The students refused to leave. The ministers washed their hands of any responsibility and left. Thereafter, the students were arrested.

The following day, Monday, September 23, 1963, another group of students demonstrated and were arrested.

The leaders of the demonstration were all in jail; the sympathetic ministers had left the scene because they felt they were not being listened to. Into this vacuum, the school administration moved, as also a number of other ministers whose leadership qualities are dubious at best. In my opinion, they verged on being charlatans.

Efforts were made to get the students to leave the jail under all kinds of implied threats and promises. Bonds were provided. The students, without any guidance whatsoever, left the jail in droves. An attempt was made to make a deal behind our backs with the Circuit Judge regarding those students who were technically in contempt for being in violation of the injunction against picketing in front of the theatre. No one told us about the proposed hearing. When we found out about it, Howard Dixon was dispatched to Tallahassee and scotched the efforts to exchange the students' freedom for a promise not to demonstrate in the future.

The remaining two groups of students were divided as follows: (1) those who were charged with violation of city ordinances; and (2) those who were charged with violation of a state statute against trespassing. The latter group is to be tried in October in the county court. The first group was kept in jail awaiting trial before the City Judge on Saturday, September 21, 1963.

To attend this trial and represent the students, I left for Tallahassee Friday evening, September 20, 1963. Upon my arrival, I was told that the "administration attorney" had taken the students in a group to the City Judge and had pleaded nolo contendere on their behalf. As a consequence, they were given suspended sentences and put on probation to avoid demonstrations during the balance of their term in the university.

I have never seen such a demoralized group of leaders and students as I encountered upon my arrival in Tallahassee. I have undertaken to reinstill some morale in these kids, and we have promised to represent them fully and completely. They do not want to say they are sorry; they indicated that they are prepared to continue their demonstrations for equality in the town's facilities.

The letter is necessarily brief and if you have any further questions, please call me.

We are planning to have an attorney in Tallahassee for the contempt hearing on Wednesday, September 25, 1963; for depositions on Thursday, September 26, 1963; and for our motion to dismiss in the federal suit on October 3, 1963.

I think that the students had the Town of Tallahassee on the run for a short while. It was only through the cowardice of the administration and persons chosen by them to act in their behalf that theskids were put under the kids and a temporary halt ensued. I am satisfied that this type of situation cannot and certainly must not happen again.

Sincerely,

TOBIAS SIMON

TS:ev

cc: Marvin Rich,
c/o CORE
38 Park Row
New York 38, N.Y.

September 25, 1963

Alfred Hopkins, Esq.
Claude Pepper Law Offices
1701 Meridian Avenue
Miami Beach 39, Florida

Dear Al:

Thanks for the copies of the brief in the Dresner v. Robinson case. You fellows are remarkable and I can't thank you enough both organizationally and individually. Have your finally decided which case you are arguing? Is it the way you described it to me? Howard and I should have a talk then and see what must be discussed.

Regards,

CR:cr
cc: Tobias Simon

CARL RACHLIN

Dresner CORE - Dresner

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ALBERT E. HARUM
EDWARD F. MITCHELL
ADELE T. WEAVER

OFFICES:
WASHINGTON, D. C.
TALLAHASSEE, FLORIDA
CORAL GABLES, FLORIDA

Sept. 28, 1963

Carl Rachlin, Esq.
280 Broadway
New York 7, N.Y.

Dear Carl:

I received your kind letter of September 25, and I've asked Howard to contact you, which he said he would do.

Howard will argue the Dresner case, and I shall argue the Robinson case. Robinson is set for the week of Oct. 14, along with Bell, Buie, Barr, and Griffin. These five sit-in cases will be argued seriatim, and are all on the summary calendar, although Jack Greenberg is trying to get an additional 15 minutes allotted.

Best wishes,

Alfred I. Hopkins

CORE 39,1

HOWARD W. DIXON
Attorney at Law

FRANKLIN 9-5651

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MIAMI 32, FLORIDA

RECEIVED
VLADECK & ELIAS

October 4, 1963

Carl Rachlin, Esq.
280 Broadway
New York City, New York

CORE

Re: Dresner et al. v. Tallahassee

Dear Carl:

Undoubtedly Toby had advised you that I shall be arguing the above described cause. I will want to get your assistance and advice on any matters regarding this case, and thusly, I will be in New York on Friday, October 18th. Can we make a luncheon engagement for that date? If so, I shall drop by your office and we can go to lunch or if you find that undesirable, we can talk in your office.

Awaiting your reply, I remain

Cordially

Howard (mep)

Howard

HWD/mep

LAW OFFICES

TOBIAS SIMON

RECEIVED
OCT 22 1963
VLADECK & ELIAS

Telephone

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223 SOUTHEAST FIRST STREET
MIAMI 32, FLORIDA
TELEPHONE FRANKLIN 7-4627

PLEASE REPLY NUMBER

October 21, 1963

Carl Rachlin, Esq.
280 Broadway
New York City, N.Y.

Dear Carl:

I am pleased to say that CORE has secured the services -- through the A.C.L.U. -- of another attorney, this time in Orlando. I believe I spoke to you previously about Jerry Bornstein, an excellent attorney, and one who would be available to be handling cases in the center of the State, i.e., Ocala, etc.

Jerry has agreed to handle the appeal of our suit against the theatres -- that is, to integrate the theatres and to test out the proposition that under the existing law these places should be opened.

We need $250.00 in cash or a cash bond to guarantee the Clerk of the Court of Appeals in New Orleans for the payment of costs. Please forward this to Jerome Bornstein, Esq., 56 East Pine, Orlando, Florida, advising me by copy of letter. Please call me if this cannot be accomplished immediately. At once! —

As of this writing, we expect to represent about thirty demonstrators who were jailed for "trespassing" on state property on October 24, 1963. In an unusual move -- for us -- we requested a jury trial. I doubt that this will be successful, but of course, neither would a trial before the court. It will, however, give us an opportunity to try to find some townspeople who might be sympathetic.

The court has indicated, in a kind of a cooperative pre-trial conference, that if there is a finding

of guilt, a judgment of "guilty" would be entered and fines of approximately $50.00 would be assessed. It was further indicated that supersedeas bonds on appeal would be set at about $200.00. If such is the case, I feel that the fines should be paid under protest and the cost of the premium avoided. Thus, we would need approximately $1,500.00 if we paid the fines, and we would need approximately $600.00 if we paid the bond premium. Please take this up with the powers that be, and have whatever moneys are required in my hands prior to my leaving for Tallahassee on October 23, 1963.

The Florida A & M University is beginning to exert pressure on the students to stay out of demonstrations. This is a much worse threat than the jailing. Some pressure should be brought upon the A & M administration to cut out the Uncle Tom habits.

Sincerely,

TOBIAS SIMON

TS:ev

They suspended the kids. I have threatened law suits

Reconsideration going on.

Call!

October 24, 1963

Tobias Simon, Esq.
[illegible] Flagler Street
Miami 36, Florida

Everett Dirksen, Esq.
Reybold Building
Miami 36, Florida

Alfred I. Hopkins, Esq.
1710 Meridian Avenue
Miami Beach 39, Florida

Dear Toby, Everett & Alfred:

You know how much I appreciate, personally and as General Counsel to CORE, your work in this case particularly and all your efforts on our behalf.

I believe that our position in the Dresner case is rather good. It is clear that on the merits the Court will have no trouble with the case. We have nine days from today to submit a memo to the Court.

Forgive me if I suggest the points to be covered.

1. The appeal of review under the common law writ of certiorari as determined from cases. I do not think we have to [illegible] to [illegible] is certainly not clear in that regard. We could easily challenge the validity of this statute in the Leon County, the Leon case is [illegible] but the appropriate method but what is the actual practice in Florida and the scope of review.

2. The [illegible] is unclear as the [illegible] Florida [illegible]

3. If the procedure is wrong, this I think will not hurt us since our [illegible] to be [illegible] should not be punished because of the wrong procedure when that is found to be right.

[illegible] Simon, Esq.
[illegible] Silver, Esq.
[illegible] I. Tushnet, Esq.

4.

has some merit.

(a) If this Court were to send this case back to Florida, the People would go to jail (or pay the fine). If they go to jail, habeas corpus would lie because of the substantial federal question even though all state remedies had not been exhausted. This is [illegible]. Please remind [illegible] so as to determine its applicability. [illegible] can say they need to go to Florida where we all have to go to jail, get a writ of habeas corpus and then come back.

(b) Under 28 USCA 1257, it may be argued that at the time of filing the petition for certiorari with the U. S. Supreme Court, there was no other remedy and we had a decision from the highest court we could get from (because the case is to move further in Florida had expired).

I am sending a copy of this letter to Ivy Kagan of Washington. If there are any questions I am sure he will give us some advice.

Cordially yours,

CM:cr
cc: Irving Kagan, Esq.
Mr. Jamal Timbal

CARL RACHLIN

LAW OFFICES

TOBIAS SIMON

INGRAHAM BUILDING ANNEX
223 SOUTHEAST FIRST STREET
MIAMI 32, FLORIDA
TELEPHONE FRANKLIN 7-4627

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OCT 29
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PLEASE REPLY NUMBER

October 28, 1963

Carl Rachlin
Counsellor at Law
280 Broadway
New York 7, New York

Dear Carl:

It is not necessary for you to compliment us-all down here as a condition precedent for making suggestions. Please recognize that any and all criticisms, suggestions, etc., are completely welcomed at all times.

Howard, Alfred and I have worked, and are working, on the "actual practice" in Florida so as to present as clear a picture of what is meant by "departure from essential requirements of law."

Thanks for the help, and we will send you a copy of the brief when it is ready.

Sincerely,

TOBIAS SIMON

TS:ev

SAM E. TEAGUE, JR.
MAYOR-COMMISSIONER

HUGH E. WILLIAMS, JR.
MAYOR-PRO TEM COMMISSIONER

J. W. CORDELL
COMMISSIONER

GEORGE S. TAFF
COMMISSIONER

DAVIS H. ATKINSON
COMMISSIONER



ARVAH B. HOPKINS
CITY MANAGER

GEORGE C. WHITE
CITY AUDITOR-CLERK

ROY T. RHODES
CITY ATTORNEY

RIVERS BUFORD, JR.
ASS'T CITY ATTORNEY

JOHN A. RUDD
MUNICIPAL JUDGE

EDW. J. HILL
CITY SOLICITOR

November 2, 1963

VLADECK & ELLIS

P. O. Box 1140

Honorable Carl Rachlin
Attorney at Law
280 Broadway
New York, New York

Re: Dresner et al v. City of Tallahassee

Dear Mr. Rachlin:

I enclose herewith a copy of the Brief which I have filed in the United States Supreme Court, in relation to the above styled matter.

I remain,

Sincerely,

Roy T. Rhodes

Roy T. Rhodes
City Attorney

RTR:mlw
Enclosure

November 7, 1963

Tobias Simon, Esq.
223 Southeast First Street
Miami 32, Florida

Howard Dixon, Esq.
Seybold Building
Miami 32, Florida

Alfred I. Hopkins, Esq.
1710 Meridian Avenue
Miami Beach 39, Florida

RE: Dresner v. Tallahassee

Dear Toby, Howard, Alfred:

Thank you for the supplemental brief. I think the procedure may be so muddied up that the Court will say no one should have to act at his peril, and thus decide the case on the merits. Hopefully they will not say that even if review were limited and uncertain, we should have tried it anyway.

I take it you decided not to suggest the Bay v. Nola arguments.

Thanks a lot.

Sincerely,

CARL RACHLIN

CR:s

CLAUDE PEPPER LAW OFFICES
WASHINGTON FEDERAL BUILDING
1701 MERIDIAN AVENUE
MIAMI BEACH 39, FLORIDA

JEFFERSON 2-4853

CLAUDE PEPPER
JAMES C. CLEMENTS (1896-1951)
ALLEN CLEMENTS, JR.
ALFRED I. HOPKINS
ALBERT E. HARUM
EDWARD F. MITCHELL
ADELE T. WEAVER

OFFICES:
WASHINGTON, D. C.
TALLAHASSEE, FLORIDA
CORAL GABLES, FLORIDA

November 21, 1963

Carl Rachlin, Esq.
280 Broadway
New York 7, New York

Dear Carl:

As you may have read, the United States Supreme Court entered an Order this week inviting the Solicitor General to file a supplemental brief in the sit-in cases dealing with the main issues in those cases. Although C.O.R.E. was not involved in the legal defense of these cases, nevertheless the Florida demonstrators were all C.O.R.E. members and I know C.O.R.E. has a vital interest in the outcome.

I am writing to you in this regard because of concern that I have with regard to the Solicitor General's position in these cases. As you may know, in the Government's amicus brief and its argument before the Court the Government, through Ralph Spritzer, argued the sole issue of vagueness of the trespass statutes. Further, Jack Greenberg and Jim Nabrit informed me that when the earlier sit-in cases were before the Court last year Archibald Cox, Solicitor General, had expressed the view that he would not under any circumstances support the doctrine of Shelley v. Kraemer as applied in sit-in cases. I don't know whether he has altered or modified his position this year. I believe it is important, therefore, that appropriate efforts be made through the Attorney General and the White House if necessary to require Cox to support our cases under the theory of Shelley v. Kraemer, the theory of local custom, and the theory of State licensing or any combination thereof. I have written to Jim Nabrit requesting that N.A.A.C.P. take whatever steps it can in the premises, and Howard Dixon is contacting the National

offices of A.C.L.U. in the same regard. Could C.O.R.E. be helpful in this respect? The Government has thirty days to file its brief and counsel are given thirty days thereafter to respond.

Since the Florida sit-in cases involve 18 C.O.R.E. demonstrators, I would appreciate it if you could give some consideration to the above.

With very best wishes, I am

Sincerely yours,

By Alfred
Alfred I. Hopkins

AIH:is

CLASS OF SERVICE

This is a fast message unless its deferred character is indicated by the proper symbol.

WESTERN UNION

TELEGRAM

W. P. MARSHALL, PRESIDENT

The filing time shown in the date line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME at point of destination

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CARL RACHLIN

280 BROADWAY NYK 172

QUESTIONS DRESNER AGAINST CITY OF TALLAHASSEE CERTIFIED TODAY TO SUPREME COURT FLORIDA PURSUANT RULE 4,61 FLORIDA APPELLATE RULES

JOHN F DAVIS CLERK

(31).

rcd 12/2/63

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

December 3, 1963

Carl Rachlin, Esq.
280 Broadway
New York, N.Y.

RE: DRESNER, ET AL. v. CITY OF TALLAHASSEE, No. 35, OCT. TERM, 1963

Dear Mr. Rachlin:

I am enclosing herewith a certified copy of the certification by the Chief Justice of certain questions to the Supreme Court of Florida in the above-entitled case. The original copy of the certification was forwarded today to the Chief Justice of the Supreme Court of Florida.

Very truly yours,

JOHN F. DAVIS, Clerk
By

E. P. Cullinan,
Chief Deputy.

Encl.
EPC:ht

VLADECK AND ELIAS
COUNSELLORS AT LAW
280 BROADWAY
NEW YORK 7, N. Y.

STEPHEN C. VLADECK
SYLVAN H. ELIAS
JUDITH P. VLADECK
CARL RACHLIN
WILBUR DANIELS

SHELDON ENGELHARD

WORTH 2-5105

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VLADECK & ELIAS

December 5, 1963

Tobias Simon, Esq.
Howard Dixon, Esq.
Alfred I. Hopkins, Esq.

Dear Toby, Howard & Alfred:

So what happens now?

Yours,

CARL RACHLIN

CR/hm

Preparing Briefs for the SC of Fla - & hoping for the best. We have at least two other cases pending before the S.C. of ~~Fla~~ U.S. involving same

jurisdictional problem. Cl's a
nuen.

CLAUDE PEPPER LAW OFFICES
WASHINGTON FEDERAL BUILDING
1701 MERIDIAN AVENUE
MIAMI BEACH 39, FLORIDA

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ALFRED I. HOPKINS
ALBERT E. HARUM
EDWARD F. MITCHELL
ADELE T. WEAVER

OFFICES:
WASHINGTON, D. C.
TALLAHASSEE, FLORIDA
CORAL GABLES, FLORIDA

RECEIVED
DEC - 9 1963
VLADECK & ELIAS

December 7, 1963

Carl Rachlin, Esq.
280 Broadway
New york 7, N.Y.

Dear Carl:

Rule 4.61 of the Florida Appellate Rules sets forth the procedure to be followed upon certification of a question by a federal court. We have to file a brief within 30 days of the date of the certification (Dec. 2), the City has 20 days thereafter to file an answer brief, and we have 10 days thereafter to file a reply brief. Oral argument may be granted upon application, and we intend to so apply. In view of the foregoing, we probably won't have an answer from the Florida Supreme Court until next Spring.

I am preparing the brief and will probably argue the matter before the Florida Supreme Court. Since we have a little more time than we had for the Supplemental Brief filed last month, I'm trying to do an exhaustive amount of research on the common-law certiorari question: thus far I've found nothing new, ile., some cases hold to strictly limited review, others allow review where the lower court applied "a wrong rule of law" in violation of the "essential requirements of law". However, I'm trying to find if the Florida Supreme Court has ever granted certiorari in cases involving the types of federal constitutional questions presented in our case, and I doubt that they exist, which may be our strongest point. Bear in mind, however, that we are at the mercy of the State cpurt now, and it will be no picnic. On the other hand, the Court will have to decide a fundamental question of local procedure, which may temper and leaven there otherwise prejudiced response to this kind of case.

The brief should be reddy in about two weeks, and I'll send you a copy. Excuse the quality of the typing herein, as it's my own product. Best wishes for the holiday season.

Alfred

HOWARD W. DIXON
Attorney at Law

FRANKLIN 9-5651

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DEC 9 1963
VLADECK & ELIAS

SEYBOLD BUILDING
MIAMI 32, FLORIDA

December 9, 1963

Carl Rachlin, Esq.
280 Broadway
New York, New York

Dear Carl:

Presuming my associates Toby and Al will write you, I should just say "Hello" and wish you a Merry Christmas;on the other hand perhaps I should not presume anything.

Rule 4.6 of the Florida Appellates Rule provides that when a certificate is filed in our Supreme Court, a brief may be filed therein by all parties, and the parties may move for oral arguments.

We are undertaking both of these tasks because we are concerned with what the Florida Supreme Court might do under the circumstances, as you can readily understand they are not "friendly" towards the U.S. Supreme Court.

A copy of the brief will be sent to you when it has been completed and you will be kept advised of the results .

Wishing you all the best for the Holiday Season, I remain

Cordially yours,

Howard W. Dixon

December 10, 1963

Mrs. Elizabeth DuBois
The Harvard Law Review
Cambridge, Mass.

Dear Mrs. DuBois:

I need the immediate help of you and your associates on an important matter.

We have a case which under Supreme Court Rule 4.61 has been sent back to the Supreme Court of Florida with three certified questions, photo copy of which is enclosed.

As you can see petitioners had bypassed the Florida Supreme Court. The question remaining open concerns the nature and extent of the review under a common-law writ of certiorari which apparently applies in the highest courts of Florida.

We had urged that inasmuch as the review was so limited in the higher courts and the Florida statute specific that the Court which affirmed the conviction was the final court of appeal, that it was not necessary to go to the higher courts of Florida.

Time is of the essence. Alfred Hopkins of Representative Pepper's office, 1701 Meridian Avenue, Miami Beach, is writing the brief which must be in, in a couple of weeks. Would one of your associates run down the extent of review available in a common-law writ of certiorari for an old gund.

With kindest regards,

Sincerely,

CR/bm
Encl.

CARL RACHLIN

cc: Alfred Hopkins
Howard Dixon
Tobias Simon

a national organization with affiliated local groups working

CONGRESS OF RACIAL EQUALITY
CORE

to abolish racial discrimination by direct, nonviolent methods

38 PARK ROW
NEW YORK 38, NEW YORK
COrtlandt 7-6270

James Farmer
national director
Richard Haley
assistant to the director
Carl Rachlin, Esq.
general counsel

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DEC 1
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December 17, 1963

Carl Rachlin
Attorney at Law
280 Broadway
New York, New York

Dear Carl:

Since July, or thereabouts, we have sent about five or six thousand dollars to Simon in Miami. His reports of expenditures are too sketchy, I fear, to satisfy the auditors. However, it occurs to me that you may have some such reports from Toby that I do not presently have. If so, I would appreciate it if you would send copies of same so our records will be complete. If not, perhaps you and I could discuss this a little before I write Toby about it.

I saw the copy of your letter to Father Drinan. It gives promise. I also saw the ACLU memorandum on the proposed new lawyers' organization. Generally speaking, I am in favor of a plurality of civil rights groups because each seems to have a special appeal to persons who would not be reached by any of the others. Nevertheless, some of the questions regarding duplication of services and overlapping of solicitation strike me as very pertinent. However, I must compliment the proponents on their idea of a vigorous, agressive frontal attack, even though we do not know how practical this would prove to be in actual situations.

Let me hear from you soon.

Sincerely,

Richard

Richard Haley,
Associate National Director

RH: AS

YALE LAW JOURNAL
401A YALE STATION
NEW HAVEN · CONNECTICUT

EDITORIAL OFFICES

RECEIVED
DEC 30 1963
VLADECK & ELIAS

December 28, 1963

Carl I. Rachlin, Esquire,
280 Broadway,
New York City, N. Y.

Dear Sir:

I am writing a Note for this Journal on the subject of abstention by the federal courts, with a special emphasis upon the Florida certification statute. This statute was again invoked in Dresner v. City of Tallahassee, the reports of which indicate that you were counsel for the petitioner.

It will be very helpful if you can furnish me with copies of any briefs, papers and the like which you may have filed in the Supreme Court in connection with that case.

If you request that I do so, any materials furnished will be returned.

Your kind consideration of this request is very deeply appreciated.

Very truly yours,

Michael A. Varet

Dear Mr Varet
Re Howard Dixon ? — Miami
Florida did not cite the case,
and is particularly familiar with
the Florida procedural point & concerns
itself whether + the
petitioners could so clearly
& the Sup Ct

~~this~~ even though there was, under Florida law, a common law writ of Certiorari available. Petitioner takes the position that there was no limited right as such but constitutes a full review. The Florida statute clearly states that the intermediate court was the final appeal in cases such as this i.e. coming up from the Tallahassee municipal court.

The U.S. Supreme Court has sent the case to the Florida Supreme Court to find out the nature & extent of the review available under a Florida common law writ of certiorari.

Mrs Dixon has all the papers and can send you copies.

V T

P.S. Please convey my regards to Mr Bishop.

December 31, 1963

Mr. Michael A. Varet
Yale Law Journal
401A Yale Station
New Haven, Connecticut

Re: Dresner v. City of Tallahassee

Dear Mr. Varet:

Mr. Howard Dixon of Seybold Building, Miami 32, Florida did most of the work on the case and is particularly familiar with the Florida procedural point. It concerns itself, however, with whether the petitioners could go directly to the United States Supreme Court even though there was, under Florida law, a common law writ of certiorari available. Petitioners took the position that this was so limited a right as not to constitute a full review. The Florida statute clearly stated that the intermediate court was the final appeal in cases such as this, i.e., coming up from the Tallahassee municipal court.

The U. S. Supreme Court has sent the case to the Florida Supreme Court to find out the nature and extent of the review available under a Florida common law writ of certiorari.

Mr. Dixon has all the papers and can lend you copies.

Very truly yours,

CARL RACHLIN

CR:cr
cc: Mr. Richard Maley

P.S. Please convey my regards to Prof. Bishop.

January 2, 1964

Mr. Richard Haley, Assoc. Director
Congress of Racial Equality
38 ParkRow
New York 38, N. Y.

Dear Richard:

Enclosed are some of the statements from Toby Simon. I am quite shocked by the amount of the figures, since little if anything has gone into fees and almost all is expense money.

As to the ACLU memorandum, Gordon and I met with Pemberton, Ed ennis and Mel Wulf together with Rowland Watts for the WDL and Ed Lukas and Harry Fleischman of the American Jewish Committee. While there are some advantages to the ACLU Program, there are also heavy disadvantages.

I have been working hard with the President Kennedy Committee of the Bar on this problem and will continue to do so. It is headed by two active Bar Association men, Harrison Tweed of New York and Bernard Segal of Philadelphia. Morris Abram, our attorney in Zev's case is active with this group also.

I have also been to the Coast to organize a lawyer's group out there where it is needed. In the near future I shall be pleased to discuss this further and tell you my thoughts on it.

Regards.

Sincerely,

CR/hm

CARL RACHLIN

CLAUDE PEPPER LAW OFFICES
WASHINGTON FEDERAL BUILDING
1701 MERIDIAN AVENUE
MIAMI BEACH 39, FLORIDA

JEFFERSON 2-4853

CLAUDE PEPPER
JAMES C. CLEMENTS (1896-1951)
ALLEN CLEMENTS, JR.
ALFRED I. HOPKINS
ALBERT E. HARUM
EDWARD F. MITCHELL
ADELE T. WEAVER

OFFICES:
WASHINGTON, D. C.
TALLAHASSEE, FLORIDA
CORAL GABLES, FLORIDA

MAR 3 REC'D

February 28, 1964

Carl Rachlin, Esq.
280 Broadway
New York City, New York

Dear Carl:

The hearing on the Certified Questions before the Supreme Court in the matter of DRESNER v. CITY OF TALLAHASSEE, is set for Tuesday, March 3rd, 1964. We just received notice from the Clerk's office the other day. I shall argue the case; Toby may also appear; however, he has commitments with the Florida Civil Rights Commission which may preclude his attendance.

The Court is allowing 45 minutes per side and since you have my main brief and reply brief, you know pretty well what our position will be. If, the Florida Supreme Court, should rule that we had not exhausted our State remedies, then I believe that in some fashion or other a further Petition or Brief will have to be filed with the United States Supreme Court, predicated upon N. A. A. C. P. v. Alabama, where the Court held that the right to Federal review should not be barred because of vagaries and inconsistencies in State procedure. You will note from my briefs that the Florida Supreme Court has on at least eighteen occasions stated that common law certiorari will lie to correct only jurisdictional or procedural errors. If the Florida Supreme Court should now delare that the District Court of Appeal and/or the Florida Supreme Court possess common law certiorari powers, with respect to the substantive issues in our case (freedom of assembly, interstate commerce and equal protection of the laws) it would be a blatant departure from prior rulings.

I will write you next week after the hearing and let you know what the Court had to say.

Sincerely,

Alfred

ALFRED I. HOPKINS

AIH/mhm

Dear Alfred
Thanks for your letter of the 28th inst. As you know we

Florida Supreme Court, under not a
Fay v. Noia Habeas Corpus proceeding
for review there is a mechanism
federal action which can be seized
by a writ even though all state
remedies were not exhausted so
long as they are at the time of
the application for the writ.

March 5, 1964

Alfred I. Hopkins, Esq.
Claude Pepper Law Offices
1701 Meridian Avenue
Miami Beach 39, Florida

Dear Alfred:

Thank you for your letter of the 28th instant. If you should lose in Florida Supreme Court, would not a Fay v. Noia Habeas Corpus proceeding be in order. There is a meritorious federal action which can be tested by a writ even though all state remedies were not exhausted, so long as they were available at the time of the application for the writ.

Sincerely,

CARL RACHLIN

CR/as

Drescher

MAR 30 REC'D

CLAUDE PEPPER LAW OFFICES
WASHINGTON FEDERAL BUILDING
1701 MERIDIAN AVENUE
MIAMI BEACH 39, FLORIDA

JEFFERSON 2-4853

CLAUDE PEPPER
JAMES C. CLEMENTS (1896-1951)
ALLEN CLEMENTS, JR.
ALFRED I. HOPKINS
ALBERT E. HARUM
EDWARD F. MITCHELL
ADELE T. WEAVER

OFFICES:
WASHINGTON, D. C.
TALLAHASSEE, FLORIDA
CORAL GABLES, FLORIDA

March 27, 1964

Carl Rachlin, Esq.
165 West 46th Street
New York, New York

Dear Carl:

I argued the Dresner case before the Florida Supreme Court on Tuesday, March 3rd and was able to elaborate upon and present to the Court all of the main points of our brief. There was very little colloquy with the Court; only Chief Justice Drew asked questions of me, and only he and one other Justice asked questions of Roy Rhodes, who argued the case for the City.

There is one disturbing feature in the case arising from the manner in which the United States Supreme Court presented the certified questions. You will note from question 2 that the Court asked "if the District Court of Appeal . . . does have such jurisdiction and had granted review in this case by way of a writ of certiorari or other process, would it have been empowered to consider fully each of the following contentions . . ." This question makes a thoroughly erroneous assumption as to Florida certiorari procedure and seems to assume that our procedure is similar to that of the United States Supreme Court on certiorari. However, our procedure does not involve filing a petition and requesting review, and no writ is granted to bring the matter up for review. We simply file a petition together with supporting brief and certified copy of portions of the record, the respondent files its brief, and then the matter is automatically set down for hearing on a motion day, then argued, and thereafter the Court either grants certiorari or denies it and in so doing either quashes the judgment below or denies the petition. This is more fully explained in my reply brief.

I am a little concerned that the Florida Supreme Court, particularly in view of some of the questions that Chief Justice Drew posed, may stick on the word "review" and ignore the fundamental issue of whether the District Court <u>had jurisdiction to act</u>, i. e., exercise its ultimate judicial power, i. e., quash the judgment

below. I suggested to the Court that regardless of whether the District Court had jurisdiction to review the case in terms of hearing arguments and considering the briefs, if it concluded that the elements of common law certiorari were not made out, then it would have to be concluded that it lacked jurisdiction; hence, based upon the United States Supreme Court case of Western Union v. Hughes, cited in my brief, the District Court would not be the highest State court in which a decision could be had within the meaning of § 1257.

I have some fears that the Florida Supreme Court may muddy the waters still further in response to the certified questions, which may require a further petition or memorandum to the United States Supreme Court. But, we shall wait and see. Meanwhile, I suggest that consideration of the matter of habeas corpus may be a little premature at this time; on the other hand, we may ultimately be compelled to take this route.

We will keep you fully advised. I plan to be away on vacation from April 8 until around May 8; if anything develops during that period, please contact either Toby or Howard.

With best wishes, I am

Sincerely yours,

Alfred

Alfred I. Hopkins

AIH:is

March 30, 1964

Alfred I. Hopkins, Esq.
Claude Pepper Law Offices
1701 Meridian Avenue
Miami Beach 39, Florida

Dear Alfred:

Thank you for your letter of March 27th.

We will hope for the best, and maybe we won't have to prepare for the worst.

Sincerely,

CR/bs

CARL RACHLIN

Ring To James as 7 June 63

1 — 270.10 Dud (Pleaker)
85

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Jur of Dist Ct of App

Circuit Cts of ~~Appeals~~

Article V - Judicial dept
S 6 (3)

" ... They shall have final appellate jurisdiction in all civil and criminal cases arising ... in municipal courts ..."

Appeal to Dist Ct of Appeal is only by Certiorari

Nothing in statute as to appeals from

It comes down to this:

(1) You cannot get above the Circuit Court except in the discretion of one or perhaps both of the higher Florida courts. Perhaps there's an analogy to a federal district court judgment which is final, except for appeal purposes, but can be reviewed by a common law writ by either a C.C.A. or the Supreme Court.

Recent calls

$278 +

+ 81

missing

NAME Patricia Due v Theatres

ACCOUNT NO. 1781 a

ADDRESS

63		ITEMS	FOL	DEBITS	CREDITS	DR CR CK	BALANCE
5	30	Call to - Tallahassee - 222-4775		253			
7	11	" " " 224-9510		308			
7	11	" " " 224-5445 Tallahassee Theatres		187			
6	5	Clerk Circuit Ct Leon Co.	8617	1350			
	12	Clerk U.S. District Court	8645	1500			
	"	U.S. Marshall	8646	350			
	19	Alfred Hopkins - L.D. calls	8661	2260			
	27	Priscilla P. Lyman	8671	3000			
5	31	E a L. theatre case	8604	12958			
	"	Cash - Tallahassee	8695	2500		-	27851
7	16	Maurice Rosen - fare to Tallahassee for depositions	[illegible]	[illegible]			
				8500			

#1781 SS

Kennon vs Tallahassee

					Dr	Cr	
	1962						
1	10-5	CORE				6x38	
2	3	Carlines Hauseds Trip to Tall		7737			
3	15	E A L. Tele Sent		7784	17500		
4	18	Cash Tallahassee trip		7804	3394		
5	19	Clerk Sust Ct.		7807	5000		
6	"	U.S Marshall		7808	1400		
7	"	"		7809	2500		
8	24	Johnsons Duplicating		7819	500		
9	24	Baker Reporting Trial		7820	7x66		
10	"	Sydelle Kahn		7821	10850		Miami Ct
11	11-3	U.S Marshall - refund			1400	3767	
12	12-6					490 331	
13	12	Sydelle Kahn		8019		210	
14	17	Tobias Simon Plane ticket		8049 to Tallahassee 1381 SS	1400		
15	31	Howard Dixon		8090	6479		
16	6-5-63	~~Sydelle~~ CORE			2151	43002	
17	1/10/63	Call to Tallahassee			DP	43002	
18	1/16/63	" " "			189		
19	1/26/63	" " "			187		
20	1/29/63	" " "			3 65		
21	2/8/63	" " "			187		
22	3-12	E A L		8315	2 50		
23	12	Hotel Lincoln		8319	6479		
24	19	Priscilla Symon		8342	5427		
25	3 12	Call to 224-6336 (Tallahassee)			15 00		
26	3 14	Miami Fla. (Collect)			138		
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- 15643 balance owing

TERMS

RATING

CREDIT

NAME Dilson

ADDRESS

DATE 1963	ITEMS	FOL.	DEBITS	CREDITS	BALANCE
7 15	Telegram to P Y J (Peterson)		176		
4 15	" " " J. (Peterson)		176		
4 15	Springfield Telegram		176		
4 15	Washington Telegram		176		
6-17	Dale L Steeves typist	8648	5750		- 17523

02 - Missing

Treasurer

		~~Trips~~	Trips	Fees	Clerk misc	Clerk Fees	Court Reporter	
/61	Tallahassee trip	19 67	19 67					
		18 03	18 03					
		30	30					
0	Fees: Horton, D. S	300		300				
5	Clerk - photocopies	12 75			12 75			
	Clerk - Appeal fee	25				25		
	"	350				350		
	Court Reporter	235 14					235 14	
	Secretary	604						
	LD calls	23 65						
	Secretary	6 25						
		16 25						
	Clerk -	25						
	Trips to Tall	85 89	85 89			25		
	Clerk	25						
	Trips to Tall	80 49	80 49			25		
	LD calls	33						
	"	26 25						
or.	Court Reporter	250					250 00	
	Trips to Tall	97 87	97 87					
	LD calls	6 20						
	Trips to Tall	50	50 00					
	?							
	Clerk							
	secret - ~~Fees~~	53 05			53 05			
		6 25						
		28 83						
	Clerk of USSC	100						
	Postage	6 30				100		
	W & Smith - Bonding Secy	500						
		2						
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	Rennew Printing Co	177 16						
	W & Smith Bonding Co	500						
3	Secy							
	Postage	10 50						
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	Rennew Printing Co	112 75						
	Telegram to NY	17 6						
	" to NJ	17 6						
	" Springfield	17 6						
	Washington	17 6						
	Bob Steele, typist	37 50						
				559 95	300 00	65 80	178 55	485 00

Treasurer

Fees	Clerk hire	Clerk fees	Court Reports	Rent Lacy postage	D calls	Books	Printing
300							
	1275						
		25					
		350					
			2351/4				
				60			
					2365		
				625			
				1645			
		25					
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					335		
			25000		2625		
					6120		
	5305						
				625			
				2853			
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				630			
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				2.5			
						17716	
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					501		
						11279	
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				172			
				3750			
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#1781

Dresner vs. Tallahassee

TRUSSELL NO. G 11-6

	1961			Dr	Cr			
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2	6 20	E a L.	6290	19767	✓			2
3	6 21	Holiday Inn	6300	1803	✓			3
4	7 5	Tall Tug Exp	6324	30	✓			4
5	5	Al Hopkins	6326	100	✓			5
6	5	H. Dixon	6327	100	✓			6
7	5	Self	6328	100	✓			7
8	7 5	Clerk of Circ Ct (photos)	6337	12 75	✓			8
9	7 18	Clerk of Sup Ct	6366	20 00.	✓			9
10		Clerk of Mun Ct	6367	3 50.	✓			10
11	7 28	Inter Band (part)	6414	23514	✓			11
12	8 7	Esther	6435	0094	✓			12
13	7 -	L D Calls	6398	2365	✓			13
14	8 28	Dola Steeds typing	6483	625	✓			14
15	9 1	do	6493	1625	✓			15
16	9 8	Clerk Sup Ct	6538	25 00	✓			16
17	10 1	Alfred Hopkins	6594	65 87	✓	Tug	To Tall	17
18	10 25	Alfred Hopkins	6670	20 00	✓	Tug	Expenses.	18
19	11 18	Clerk - Circuit Court	6746	25 00	✓			19
20	12 19	Alfred Hopkins	6835	8049	✓	Tug	Not to Steele Cases.	20
21								21
22				(109066)				22
23								23
24	1 24		CD	33	✓	cash		24
25	1-10-62	FCLU refund	6910	26 25	✓			25
26	4-9	Isidore Bakst	7022	5000	✓			26
27	5-7	E a L.	7303	67 87	✓	Tug		27
28	"	Totals Bonus Cash	7303A	3000	✓			28
29	5-14	CORE						29

MSS SEDFRE

State Historical Society of Wisconsin

Couchois, James Orville vs. United States of America, Aug. 1943

Box 36
Folder 3

Please Retain Original Order

No. 10,777

United States Circuit Court of Appeals
FIFTH CIRCUIT

JAMES ORVILLE COUCHOIS alias
JAMES ORVILLE CAMPBELL alias
JAMES ORVILLE CONCOIS,

Appellant,

versus

UNITED STATES OF AMERICA

Appellee.

Brief of American Civil Liberties Union, amicus curiae.

American Civil Liberties Union,
amicus curiae.
C. DICKERMAN WILLIAMS,
Counsel.

Of Counsel
CARL RACHLIN, *of the New York Bar.*
JOHN D. MILLER, *New Orleans.*

HAUSER PRINTING CO., INC., NEW ORLEANS

No. 10,777

United States Circuit Court of Appeals

FIFTH CIRCUIT

JAMES ORVILLE COUCHOIS alias
JAMES ORVILLE CAMPBELL alias
JAMES ORVILLE CONCOIS,

Appellant,

versus

UNITED STATES OF AMERICA

Appellee.

Brief of American Civil Liberties Union, amicus curiae.

INTEREST OF THE AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union is a non-partisan, non-sectarian organization. It has a membership of thousands in all states of the Union, including those comprised by the fifth Federal judicial circuit. For more than twenty years it has pursued the object stated in its charter namely, to maintain civil liberties throughout the United States, and to take all legitimate action in furtherance thereof. Accordingly, the fundamental rights of persons, no matter what their race, creed, color

or political personasion have been defended in the courts, and the American Civil Liberties Union has appeared as *amicus curiae*, in many cases involving issues of Civil Liberties.

The American Civil Liberties Union asks leave to appear as *amicus curiae* and directs itself solely to the question as to whether the action of the court below in denying the motion for a continuance made by appellant's attorney upon his appointment by the court to defend him was a denial of the protection granted to appellant by the Sixth Amendment to the Constitution of the United States, reading as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense".

THE FACTS

Appellant was indicted on two counts under Section 33 of Title 50 of the United States Code for the crime of sedition (R. 3-6). The statements attributed to appellant as seditions and which he denied having made were allegedly uttered on the high seas on board the SS. WEST NOHNO (R. 4, 5), the crew of which appellant was a member (R. 65).

The case was called for trial on the morning of August 2, 1943, (R. 6). The court asked the appellant if he was represented by counsel and the appellant stated he was not. The court thereupon appointed Sam W.

Pipes III to represent the appellant. Mr. Pipes was notified of the case and arrived at the court room about 10:30 or 11:00 o'clock, and the cause immediately went to trial. (R. 7).

At no time prior to the trial had appellant been represented by counsel (R. 11-12, 15-16). At the hearing before the Steamboat Inspection Agency appellant declined counsel (R. 11); after the indictment, however, he not only did not waive counsel but informed the court that he had expected counsel to represent him and that the counsel so expected was not present (R. 15). The court, however, did not offer to appoint counsel until the actual trial (R. 16). Mr. Joseph Curran, president of the National Maritime Union (R. 21) had assured appellant that counsel would represent him (R. 14), although Curran later said the Union would assume no responsibility for his defense (R. 22).

When Mr. Pipes accepted the appointment to defend appellant, he moved for a continuance so as to advise with appellant, obtain witnesses whose names were suggested by appellant and prepare the defense (R. 18). The court denied this motion on the ground that the government had its Navy witnesses ready, and the trial could not be postponed at this time (R. 32). In addition, the court stated that defendant knew the date of trial and had, in fact, inquired of both the court and the District Attorney as to obtaining witnesses (R. 32). To this ruling appellant excepted. The jury was selected and impaneled. Between 11:30 a. m. (R. 32) and 12:00 noon (R. 18), recess until 2:30 p.m. was declared. From the calling of the recess until 2:00 p.m. appellant was engaged in telling Mr. Pipes the facts of the case. This was interrupted for a conference which Mr. Pipes had previously arranged with the government attorney (R.

19). At 2:30 p. m. that afternoon the trial began (R. 32).

Never having defended anyone for sedition before, Mr. Pipes had to study both law and fact between 6:00 p.m. that night and 9:30 a.m. the next morning (R. 19). Many of the facts brought out at the trial were unknown to Mr. Pipes (R. 19) It was not until the cross-examination of Ryan, an important witness for the government, that Pipes learned that Ryan was an active member of the Communist Party (R. 20).

Although a negative showing was made from information in the government's possession and statements made by appellant (R. 20-3, 60-61), Pipes had no opportunity to present witnesses before the jury for the adequate defense of appellant, a stranger in Mobile and whose home was in Detroit (R. 11).

After a trial of several days, appellant was found guilty as charged (R. 8) and was sentenced to 5 years' imprisonment (R. 9). Appellant's motion for a new trial (R. 9), part of which was based on the fact that the court did not grant the application for a continuance made at the beginning of the trial, was overruled and denied (R. 24). The Grounds of Appeal (R. 25-28) and the Bill of Exceptions (R. 31-2) set forth in detail the inability of the court-appointed counsel to prepare adequately for trial.

IN DENYING COUNSEL FOR THE APPELLANT AN OPPORTUNITY TO PREPARE FOR TRIAL, THE COURT DEPRIVED APPELLANT OF THE RIGHT TO HAVE THE ASSISTANCE OF THE COUNSEL GRANTED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, * * * to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense".

The rights accorded to an accused by the Sixth Amendment have been deemed so important by the United States Supreme Court that a denial of these by a State Court is a denial of due process of law guaranteed by the Fourteenth Amendment. *Powell v. Alabama*, 287 U.S. 45.

While it is literally true that appellant did have the assistance of counsel for his defense, "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case". *Commonwealth v. O'Keefe*, 298 Penna. 169, 173, 148 Atl. 73.

In the case at bar, counsel for appellant had no opportunity to study the law or the facts. To deny counsel the right to prepare the defense, study the problems involved, obtain witnesses, as was the fact in this case, is effectively to deprive appellant of the right to counsel.

In *Avery v. Alabama*, 308 U. S. 444, the United States Supreme Court has said at p. 446:

> "Disposition of a request for continuance* * * is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed.
>
> But the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment".

Because proof showed the accused was properly represented and nothing more could have been done for him, the Supreme Court affirmed the conviction in the *Avery* case. The rule the Court set forth, however, is clear—counsel must according to the circumstances of the case be given an opportunity to prepare. The facts in the case at bar are radically different from those in the *Avery* case. Here counsel was forced to go to trial immediately without any preparation. Furthermore, appellant was a stranger in the community, being a resident of Detroit and could not obtain witnesses in his behalf. These facts bring this case within the rule declared in the *Avery* case and require a reversal of the conviction herein.

Many of the highest state courts in similar cases have set aside convictions because the circumstances amounted to a deprivation of the right to counsel,

State v. Ferris, 16 La. Ann. 424;
Brown v. State, 120 Ga. 145;
Commonwealth v. O'Keefe, *supra;*
People v. Shiffman, 350 Ill. 243;
People v. McLaughlin, 291 N. Y. 480.

In *People v. McLaughlin*, *supra*, the facts are very similar to those involved herein. At the call of the cal-

endar, the accused said he had to obtain a new lawyer although he had previously been ready (291 N. Y. at p. 482). The court appointed counsel shortly after noon and set the case for trial at 2:00 p.m. that day. In unanimously reversing the judgment of conviction, the New York Court of Appeals said, referring to the right to counsel:

> "This fundamental right is denied to a defendant unless he gets reasonable time and a fair opportunity to secure counsel of his own choice and, with that counsel's assistance, to prepare for trial; no last-minute, peremptory assignment of counsel will serve, particularly when made at such a time and under such circumstances, as practically to preclude the giving by counsel to prisoner and prisoner to counsel, of effective aid in the preparation of the case". (P. 483)

It is true from appellant's own statements that he expected counsel to be present (R. 15). Nevertheless, the fact remains that at no time was he represented by counsel until Mr. Pipes was appointed by the court immediately before trial.

The court acknowledged that appellant personally had written to him and to the District Attorney to aid appellant in obtaining witnesses (R. 22). Furthermore, appellant gave two government agents a list of witnesses he wished present (R. 15). Yet despite this, there is no dispute that appellant did not have any witnesses present at the trial. In fact, the District Attorney told appellant the Government would not bring his witnesses to Mobile at the Government's expense (R. 15). Because of the lack of time, his counsel was unable to obtain any witnesses. As the acts were alleged to have taken place on the high seas, local people could know nothing of them. Even if there were time to interview them, counsel could not reasonably have done so, study the law and make other prep-

arations between 6:00 p.m. and 9:30 a.m. after a full day in court.

As a result, the best that appellant could offer to the jury, in addition to his own testimony, by way of defense, was a stipulation between counsel that certain witnesses if present would testify that in effect they did not hear the statements attributed to appellant (R. 60-1). This stipulation of mere negative proof was simply read to the jury after the Government had produced in court numerous witnesses over a period of several days. At most, the reading of this stipulation took only a few minutes and obviously was of little moment as compared with the personal appearance of witnesses for the Government.

From information in the possession of the Government's attorney, it was evident that these absent witnesses would have testified for the appellant (R. 20). If these witnesses had been present in court there would have been opportunity for corroboration of appellant's version of various incidents (e.g., See R. 75-7). The lack of such opportunity to present corroborating testimony was a serious handicap to a proper defense of the charges which cannot in any reasonable manner be off-set by the stipulation entered into by counsel.

In addition, because of the lack of time allowed for the preparation of the defense, Mr. Pipes was not able to obtain copies of two books "Johnny Get Your Gun" and "The Copperheads" from which counsel hoped to show that some of the statements attributed to appellant were in fact quotations from these books (R. 20). This, too, was a serious handicap for the defense of a man accused of sedition against his Government.

As the Supreme Court of Louisiana in *State v. Ferris, supra*, stated:

> "The counsel appointed by the court is entitled to a reasonable time for the preparation; and this necessitates a postponement of the trial. But what constitutes a reasonable time must depend upon circumstances; and should be regulated by the District Judge in the exercise of a sound discretion. In the case at bar no time whatever was granted to the party.
>
> "It is therefore ordered and decreed, that the judgment of the District Court and the verdict of the jury be voided and set aside, and that this cause be remanded for a new trial." (p. 425).

A further adjournment may have involved hardship to the members of the U. S. Navy who were government witnesses, but a more fundamental right was involved than mere inconvenience. The United States Supreme Court in *Powell v. Alabama, supra,* has said in reversing a conviction where counsel for accused was appointed, as in this case, almost immediately before trial:

> "It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit, of regulated justice but to go forward with the haste of the mob." (p. 50).

It is, therefore, respectfully urged that this Court set aside and reverse the conviction of appellant obtained

in the United States District Court for the Southern District of Alabama on the ground that Appellant was deprived of the right to counsel accorded him by the Sixth Amendment to the United States Constitution.

Respectfully submitted,

American Civil Liberties Union,
amicus curiae.

C. DICKERMAN WILLIAMS,
Counsel.

Of Counsel
CARL RACHLIN, *of the New York Bar.*
JOHN D. MILLER, *New Orleans.*

MSS
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Cox, B. Etton vs Louisiana, 1964-1965 Aug. 1965

(Appeal of Conviction of Demonstrating near a Courthouse)

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

BATON ROUGE DIVISION

B. ELTON COX, NUMBER
Plaintiff

VS.

SARGENT PITCHER, JR., ESQ.
DISTRICT ATTORNEY FOR THE
19TH. JUDICIAL DISTRICT
BATON ROUGE, STATE OF LOUISIANA
Defendant

* *

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION:

COMPLAINT

1. Jurisdiction

Jurisdiction is based on:

A.) The due process and equal protection of the Fourteenth Amendment to the United States Constitution.

B.) Title 28 U.S. Code Section 1343 (3) and (4) which provides original jurisdiction in U.S. District Courts in action for deprivation of rights, privileges and immunities secured by the United States Constitution and Acts of Congress providing for equal rights of all citizens.

C.) Title 28 U.S. Code Section 2283 which provides for an injunction by a court of the United States to stay proceedings in a State court to protect or effectuate judgments of a United States court.

D.) Title 42 U.S. Code Section 1981 which provides that all persons shall have the same right to the full and equal benefit of all laws for the security of persons and property.

E.) Title 42 U.S. Code Section 1983 which provides for actions at law or suits in equity by persons who under color of State statute are deprived of rights, privileges, or immunities secured by the Constitution and laws of the United States.

F.) Title 42 U.S. Code Section 1988 which provides for the exercise, and enforcement of jurisdiction in Title 42 matters to be in conformity with the laws of the United States.

2. Nature of Cause of Action

This is a proceeding on behalf of plaintiff for an Ex Parte Temporary Restraining Order, Preliminary and Final Injunctions prohibiting the defendant from prosecuting the plaintiff in contravention of a mandate of the United States Supreme Court reversing a conviction of plaintiff for violating Louisiana statutes.

3. Plaintiff

Plaintiff is Rev. B. Elton Cox, A Negro citizen of the United States and of the State of North Carolina. He holds membership in the Congress of Racial Equality, and is a Field Secretary for same. His organization is an association of persons engaged in seeking, by lawful and peaceful means, the equal civil rights of Negroes and all persons in the United States.

4. Defendant

Defendant, Sargent Pitcher, Jr., Esq. is District Attorney for the 19th Judicial District, Baton Rouge, State of Louisiana.

5. Facts

a.) As a result of the activities of plaintiff on December 15, 1961 as a leader of a demonstration of some 2,000 Negro students opposite the courthouse in East Baton Rouge Parish, he was charged with:

1. Criminal conspiracy L.S.A.-R.S. 14:26
2. Obstructing the sidewalk L.S.A.-R.S.14:100.1
3. Obstructing justice L.S.A.-R.S. 14: 401
4. Disturbing the peace L.S.A.-R.S. 14:103.1

Plaintiff was acquitted of the criminal conspiracy charge but was found guilty and sentenced on the other charges. Review by the Louisiana State Supreme Court proved that plaintiff had been illegally, sentenced, whereupon the error was cured and a second review by the State Supreme Court on June 28, 1963 in case number 46396 affirmed the obstructing justice conviction. On November 12, 1963 the State Supreme Court affirmed plaintiff's convictions of disturbing the peace and obstructing sidewalk in case number 46618. These three convictions were review by the United States Supreme Court during the October term, 1964, in cases numbered 24 and 49 and all three convictions

were reversed in two separate opinions on January 18, 1965 by Mr. Justice Goldberg. A copy of the mandate of the United States Supreme Court in each of these two cases, number 24 and 49, is attached hereto and made a part hereof.

b.) Subsequent to these two decisions of the United States Supreme Court, undersigned counsel received by mail in New Orleans what purports to be service on plaintiff dated March 2, 1965. This document states that in case number 42-201, the same number as the case in which plaintiff was formerly charged with obstructing justice in East Baton Rouge Parish trial is set for May 7, 1965, but a subsequent Notice of Trial, dated June 9, 1965, changed the date of trial to June 30, 1965, the June 9, 1965 Notice of Trial being attached hereto and made a part hereof. However, neither plaintiff nor his counsel have received a copy of the indictment or information against him, although it was reported in the Wednesday morning, May 5, 1965, edition of the Baton Rouge Morning Advocate newspaper at pages 1 and 4A, column 1, that:

> "District Attorney, Sargent Pitcher, said he will amend the bill of information to charge Cox with attempting to impede justice by demonstrating near a Courthouse."

A copy of this newspaper is attached hereto and made a part hereof.

c.) In view of the statement attributed to defendant, Sargent Pitcher, Jr., Esq., it appears that plaintiff is being charged with the offense of attempt under L.S.A.-R.S. 14:27, a separate, but lesser grade of the obstructing justice offense with which plaintiff was formerly charged and the conviction for which was reversed by the United States Supreme Court in case number 49 mentioned above.

6. The prosecution of plaintiff has been, and is being carried on with the sole purpose of, and effect of harassing plaintiff and punishing him for and deterring him from exercising his constitutionally guaranteed and protected rights of free speech and assembly to

a.) protest the conditions of racial discrimination which the State of Louisiana now maintains by statute, ordinance, regulation, custom, usage, force and practice;

b.) urge Negroes, the victims of this discrimination to register for voting in federal and state elections, free of racial discrimination.

The harassment of petitioner by defendants is, therefore, pursuant to and a part of a pervasive scheme of racial discrimination which is now encouraged, followed and enforced by State authority and action in the form of legislation and acts of the executive and judicial branches of the government of the State of Louisiana.

7. By reason of the foregoing, plaintiff is being prosecuted for acts done under color of authority derived from the Constitution and laws of the United States providing for equal rights, that is, Amendments I, XIV, and XV of the United States Constitution, 42 U.S.C. Sections 1971, 1983 and 1985 (1958), and for refusing to do acts on the ground that they would be inconsistent with the Constitution and laws cited. Also, by reason of the allegations made in paragraphs 1 through 6 above, and more particularly, of paragraph 8 below, plaintiff has been denied, is being denied, and cannot enforce in the courts of the State of Louisiana his rights under the cited federal constitutional and statutory sections providing for the equal rights of citizens of the United States and of all persons within the jurisdiction of the United States.

8. Plaintiff is unable to enforce his federal rights in the state courts of Louisiana and particularly in the 19th, Judicial District Court, because those courts are hostile to petitioner by reason of race and his civil rights activity and by reason of the commitment of defendants and those courts to enforce Louisiana's policy of racial discrimination. More particularly, plaintiff is unable to enforce his federal rights in the District Court for East Baton Rouge where plaintiff is to be tried because:

a.) District Court Judges are elected for terms of four years at elections at which Negroes have been systematically denied the right to vote by reason of race in violation of the Fifteenth Amendment;

b.) Negroes are systematically excluded from juries in the District Court by reason of race;

c.) Criminal defendants charged with offenses arising out demonstrations and other exercise of their equal civil rights have usually been held to answer under excessive and exorbitant bail, and if convicted, maximum sentence is imposed;

d.) Negro defendants, Negro witnesses, and Negro attorneys are addressed by their first names, as a mark of contempt and racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment; and

e.) The District Court sits in a community that is hostile to and inflamed against Negroes and, in particular, hostile to and inflamed against persons like plaintiff who actively exercise federal constitutional rights by working in a lawful and peaceful manner to achieve the equal rights of Negroes and of all persons within the State of Louisiana and the United States.

9. In view of the express prohibition against former jeopardy in the Louisiana Constitution, Article 1, Section 9, and in the Louisiana Revised Statutes, L.S.A.-R.S. 14:27 and L.S.A.-R.S. 15: 279, institution of the present criminal proceedings against plaintiff constitutes a discriminatory application of the constitution and laws of the State of Louisiana which deprives plaintiff of his federal right to due process under the Fourteenth Amendment of the United States Constitution. Further, the express prohibition against former jeopardy by the constitution and laws of the State of Louisiana exposes defendant's commencement of the present criminal proceedings as a flagrant defiance of the mandate of the United States Supreme Court reversing the Louisiana Supreme Court, in an attempt under color of state authority to harass plaintiff and deprive him of his federally protected rights under the Fourteenth Amendment and 42 U.S.C. Section 1983.

10. Plaintiff further alleges that the institution by defendant of the criminal action complained of herein is a deliberate attempt to render null and void a judgment of a Federal Court as clearly expressed in the above-mentioned mandate reversing the Louisiana Supreme Court and, plaintiff submits that this Court is explicitly empowered

by 28 U.S.C. Section 2283 to stay the present proceeding against plaintiff in the Louisiana state courts in order to effectuate the judgment of the United States Supreme Court.

11. Plaintiff further alleges that until the commencement of the criminal proceedings complained of herein, it was unthinkable that defendant would act in contraven- of a specific mandate of the United States Supreme Court. However, in view of defendant's present action, it is not at all inconceiveable that defendant will will bring further and as yet unknown proceedings also contrary to the mandate of the United States Supreme Court. Because of this overhanging threat of future proceedings, and because plaintiff is unable to enforce his rights in the State courts of Louisiana, there is a clear and imminent threat of irreparable injury amounting to manifest oppression of plaintiff's rights which justifies the assertion of the equity powers of this Court to enjoin defendant from instituting further proceedings against plaintiff contrary to the above-mentioned mandate of the United States Supreme Court.

WHEREFORE, plaintiff prays that the Court sign an ex parte Temporary Restraining Order enjoining defendant, his agents, representatives, employees, successors and all persons in active concert with him from:

1. Continuing the prosecution of case number 42-201 in East Baton Rouge, Parish, State of Louisiana, and any other pending cases contrary to the letter and spirit of the above-mentioned mandates of the United States Supreme Court;
2. Instituting any further proceedings contrary to the letter and spirit of the above-mentioned mandates of the United States Supreme Court;
3. Harassing or otherwise depriving plaintiff of his constitutionally protected rights in contravention of the letter and spirit of the above-mentioned mandates of the United States Supreme Court;
4. Doing or having done by others any acts contrary to the letter and spirit of the above-mentioned mandates of the United States Supreme Court;

Said Temporary Restraining Order to remain in effect until it expires or until defendant satisfies the Court that the present State court proceeding has been or will be abandoned.

Plaintiff further prays that the Court advance this cause on the

docket and order a speedy hearing of this action according to law, and after such hearing that this Honorable Court enter Preliminary and Permanent Injunctions identical to that prayed for in the Temporary Restraining Order.

Plaintiff further prays for a judgment against defendant for damages of $20,000 attorneys fee, expenses and costs.

Plaintiff further prays that this Court will grant such other, further, additional or alternative relief as may appear equitable, just, and proper.

BY ATTORNEYS:
ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA
523-5197

BY:_____

OF COUNSEL:
MURPHY BELL
917 SOUTH 13TH. STREET
BATON ROUGE, LOUISIANA

V E R I F I C A T I O N

I, NILS R. DOUGLAS, of lawful age, first being duly sworn upon oath, depose and say:

That I am a member of the bar of Louisiana and of the U.S. District Court for the Eastern District of Louisiana;

That I am the duly authorized attorney for plaintiff herein, authorized to prepare and verify the annexed complaint;

That I have read the annexed complaint and know the contents thereof;

That I know of my personal knowledge that all facts stated therein are true except such as are stated on information and belief;

That as to subject matter I believe the complaint to be true; and

That I sign this verification on behalf of the plaintiff, because the annexed complaint deals chiefly with matters of law and legal inference to be drawn from facts alleged and/or of which I as an attorney have more knowledge than the plaintiff.

_____

NILS R. DOUGLAS

SWORN TO AND SUBSCRIBED

BEFORE ME THIS_____

DAY OF JUNE, 1965.

_____

N O T A R Y P U B L I C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

BATON ROUGE DIVISION

B. ELTON COX,

Plaintiff

VS.

SARGENT PITCHER, JR., ESQ.
DISTRICT ATTORNEY FOR THE
19TH. JUDICIAL DISTRICT
BATON ROUGE, STATE OF LOUISIANA,

Defendant

* *

ORDER TO SHOW CAUSE

IT IS ORDERED that defendant, Sargent Pitcher, Jr., Esq., District Attorney, 19th. Judicial District, Baton Rouge, Louisiana, show cause on the day of 1965 at o' clock .M. why the Temporary Restraining Order herein prayed for should not immediately issue.

IT IS FURTHER ORDERED that copies of this order to show cause be served upon all parties hereto immediately, and according to law.

NEW ORLEANS, LOUISIANA , 1965.

UNITED STATES JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

BATON ROUGE DIVISION

B. ELTON COX,
Plaintiff

NUMBER

VS.

SARGENT PITCHER, JR., ESQ.
DISTRICT ATTORNEY FOR THE
19TH. JUDICIAL DISTRICT
BATON ROUGE, STATE OF LOUISIANA
DEFENDANT

TEMPORARY RESTRAINING ORDER

* *

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION:

Whereas in the above named cause it has been made to appear by the verified complaint filed herein on the day of 1965, presented to the Honorable , Judge of the United States District Court for the Eastern District of Louisiana, that a restraining order preliminary to hearing upon motion for a preliminary injunction should issue without notice, because immediate and irreparable injury, loss and damage will result to the plaintiff before notice can be served and a hearing had thereon; and;

Whereas defendant's unlawful act in prosecuting plaintiff violates a mandate of the United States Supreme Court, the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and laws and decisions of the United States;

Whereas notice and hearing before entering a temporary restraining order should not be required because plaintiff has no adequate remedy at law;

Now, therefore, on motion of plaintiff: IT IS ORDERED that defendant, his agents, representatives, employees, successors and all persons in active concert with him be and the same are enjoined from:

1. Continuing the prosecution of case number 42-201 in East Baton Rouge Parish, State of Louisiana, and any other pending cases contrary to the letter and spirit of the above-mentioned mandate of the United States Supreme Court;

2. Instituting any further proceedings contrary to the letter and apirit of the above-mentioned mandates of the United States Supreme Court;

3. Harassing or otherwise depriving plaintiff of his constitutionally protected rights in contravention of the letter and spirit of the above-mentioned mandates of the United States Supreme Court;

4. Doing or having done by others any acts contrary to the letter and spirit of the above-mentioned mandate of the United States Supreme Court.

Said temporary restraining order to remain in effect until it expires or until defendant satisfies the Court that the present State court proceeding has been or will be abandoned.

This restraining order issued at o'clock .M. this day of ,1965.

UNITED STATES JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

BATON ROUGE DIVISION

B. ELTON COX, NUMBER

Plaintiff

VS.

SARGENT PITCHER, JR., ESQ.
DISTRICT ATTORNEY FOR THE
19TH. JUDICIAL DISTRICT
BATON ROUGE, STATE OF LOUISIANA

Defendant

* *

REQUEST FOR ADMISSIONS AND PRODUCTION OF DOCUMENTS

Pursuant to The Rules of the Federal Rules of Civil Procedure, plaintiff requests that defendant, District Attorney Sargent Pitcher, Jr. Esq., be required to admit the following:

1. That defendant made the statement attributed to him by the Baton Rouge Morning Advocate Newspaper in its Wednesday morning May 5, edition, namely:

> "District Attorney Sargent Pitcher Jr., Esq. said he will amend the bill of information to charge Cox with attempting to impede justice by demonstrating near a courthouse."

Plaintiff further requests that he be furnished with a certified copy of the bill of information as defendant intends to amend it, that is, the bill of information upon which plaintiff is to be tried, not a bill of information which will be later amended to charge other and unknown offenses.

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA

BY: _____
MURPHY BELL
971 SOUTH 13TH. STREET
BATON ROUGE, LOUISIANA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

BATON ROUGE DIVISION

B. ELTON COX, NUMBER
Plaintiff

VS,

SARGENT PITCHER, JR., ESQ.
DISTRICT ATTORNEY FOR THE
19TH. JUDICIAL DISTRICT
BATON ROUGE, STATE OF LOUISIANA
Defendant

* *

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff moves the court for a preliminary injunction enjoining the defendant, his agents, representatives, employees, successors and all persons in active concert with him from:

1. Continuing the prosecution of case number 42-201 in East Baton Rouge, Parish, State of Louisiana, and any other pending cases contrary to the letter and spirit of the above-mentioned mandates of the United States Supreme Court;
2. Instituting any further proceedings contrary ot the letter and spirit of the above-mentioned mandates of the United States Supreme Court;
3. Harassing or otherwise depriving plaintiff of his constitutionally protected rights in contravention of the letter and spirit of the above-mentioned mandates of the United States Supreme Court;
4. Doing or having done by others any acts contrary to the letter and spirit of the abovementioned mandates of the United States Supreme Court;

Unless restrained by this court defendant will perform the acts referred to, and such acts by defendant will result in irreparable injury, loss and damage to plaintiff. The issuance of a preliminary injunction herein will not cause undue inconvenience or loss to defendant, but will prevent irreparable injury to plaintiff.

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA
523-5197

BY: _____
MURPHY BELL
971 SOUTH THIRTEENTH STREET
BATON ROUGE, LOUISIANA

The Conviction of the Appellant Under the Louisiana Statute Punishing Demonstrations In or Near a Courthouse Deprived Him of Due Process of Law Because There Was No Evidence Upon Which the Conviction Could be Based

The State of Louisiana failed at the trial of this case to present any evidence of intent to obstruct justice or to influence a court officer, evidence which is required by the Louisiana Statute punishing demonstrations in or near a courthouse. The only evidence of any sort presented against the Rev. Mr. Cox was the simple fact that he had led a demonstration in a manner prescribed by the police, across the street from a courthouse in protest against the arrest of prisoners then incarcerated in the jail attached to the courthouse. To treat this simple demonstration as evidence of such a danger or of intent to [illegible] would infringe the right of freedom of [illegible]. And thus Mr. Cox has been convicted

without evidence of any crime which could constitutionally be proscribed by the legislature of Louisiana. Such a conviction constitutes a denial of due process of law under the Fourteenth Amendment. Thompson v. Louisville, 362 U.S. 199 (1960), Garner v. Louisiana, 368 U.S. 157 (1961); Taylor v. Louisiana, 370 U.S. 154 (1962).

In general, in making a determination whether evidence of a state crime is so lacking as to constitute a denial of due process of law, this Court is bound by the state's judgment as to the meaning of the law, Garner v. Louisiana, supra. We must assume at the outset, however, that merely demonstrating to protest an arrest is not, "because it could not be", Thompson v. Louisville, 362 U.S. 199, 206 (1960), enough to show a clear and present danger to the administration of justice or of intent to obstruct justice or disturbance on account of the court. Concepts applied by [illegible] Courts in analogous cases support this

conclusion even though this statute has not previously been construed by the Supreme Court of Louisiana. In Graham v. Jones, 200 La. 137, 159, 171, 179, 183, 7 So. 2d 688, 695, 699, 702, 703 (1942), the clear and present danger rule outlined by this Court in Bridges v. California, 314 U.S. 252 (1941) was applied to dismiss five convictions for contempt by publication. It was not applied in the present case of a demonstration outside a courthouse, which is constitutionally indistinguishable. In State v. Daniels, 236 La. 998, 109 So. 2d 896 (1959), a rigorous standard of intent was required for a statute similar to the one in this case. In that case the defendant, a convict who had struck a prison guard was charged with the crime of "Public Intimidation", being the use of force upon a public officer "with the intent to influence his conduct in relation to his position, employment, or duty." L.S.A.-R.S.14:122. The Louisiana Supreme Court reversed the conviction on the

ground that merely to have struck the guard was not enough to show the ~~xx~~ required intent. Here, however, the Louisiana Supreme Court held that a simple demonstration is enough to show intent to obstruct justice or influence a court officer in the discharge of his duty. The ~~kk~~ Louisiana Supreme Court has failed in this case to apply the rigorous standards for clear and present danger and for intent which it has developed in closely similar cases, and it has thus affirmed a conviction based upon no evidence of acts which may be punished either under Louisiana law, or The United ~~States~~ States Constitution.

DISCRIMINATORY ADMINISTRATION OF THE LOUISIANA STATUTES INVOLVED IN THIS CASE HAS DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT

Passing from the construction of the statutes involved here to the manner of their administration, the facts in this case show that the statute was used by the state and city authorities, and by the District Court judge as well, to discriminate against active campaigning for integration of the races. The Louisiana Supreme Court has attempted to characterize this demonstration in such a way that it appears that a riot was "inevitable," and was averted only by timely action by the authorities. It refers to the speech by Rev. Cox as "inflammatory" and to the demonstration as "fiery" and "frenzied." 158 So.2d at 177; (Appendix.) Nevertheless, all witnesses agree, and the state's witnesses and the Louisi-

[illegible] of the students at all times. (Ibid.)

The speech of Rev. Cox was not only not a violent statement (T. 158, 268) but according to all the witnesses, it actually recommended peaceful protest, turning the other cheek (T. 299, 363) and love for one's enemy (T. 254). In fact Sheriff Clemmons specifically stated that the "inflammatory" element in Cox's speech was his advocacy of a sit-in at segregated lunch counters (T. 364). There was testimony that there was no threat of violence from the demonstrators; one witness for the state, in fact, felt that there was no fear of violence except from the white onlookers (T. 128), and the police were well able to handle them (T. 329). The demonstration was carried on in the manner prescribed by the chief of police and the sheriff, and they were willing to permit and did permit the demonstration until Rev. Cox advocated a sit-in at lunch counters. They felt that to be [illegible] (T. 375) and the trial judge

the Sheriff to break up. 156 So.2d at 448. While it is disputed just what Rev. Cox did say, if anything, it is clear that the question whether he meant to obey the order or not is only relevant if the command was made in a valid manner. (T. 58, 82, 106, 275, 315, 354, 373, 521)

[illegible] with [illegible] when he said:

> "It must be recognized to be inherently dangerous and a breach of the peace to bring 1,500 people, colored people, down in the predominantly white business district in the City of Baton Rouge and congregate across the street from the Courthouse and sing songs as described to me by the defendant as the COORE national anthem carrying lines such as "black and white together" and to urge those 1,500 people to descend upon our lunch counters and sit there until they are served. That has to be an inherent breach of the peace, and our statute 14:103.1 has made it so." (T. 545 (Appendix p.)

These all the authorities intended to permit the demonstration only so long as it did not openly oppose segregation." Under the decisions of this Court, to permit a demonstration until it advocates ideas with which the authorities or the general public disagree is a discriminatory application of the law which constitutes both an interference with freedom of speech and a denial of [illegible] protection of the [illegible] See Niemotko v. Maryland, 340 U.S. 268 (1951); Fowler v. Rhode Island, 345 U.S. 67 (1953); Kunz v. New York, 340 U.S. 290 (1951); Saia v. New York, 334 U.S. 558 (1948).

Appellant was Denied Equal Protection of the Laws and Due Process of Law by being [illegible] Was Segregated Due to State Action

There is no question that the white and Negro races were segregated by the action of the judge of the District Court at the trial of this case. The judge stated that the courtroom was segregated for "the purpose of maintaining order in the courtroom", and that he himself had ordered that half of the white section be turned over to Negroes. (T.5-6, Appendix p. [illegible] It is equally clear that this action by the judge and action by the state denied the Appellant the protection of the Fourteenth Amendment.

[illegible]

case, this Court reversed the conviction of the defendant, a Negro, for contempt for sitting in the section reserved for whites in a [illegible] courtroom upon the ground that his conviction would be a denial of equal protection of the laws by state action. The only question is whether this unconstitutional state action affects the trial of the Rev. Cox, a Negro defendant, [illegible] arising out of a demonstration in protest against segregation and against

It is evident, nevertheless, that the trial of Rev. Cox did result in a denial of equal protection of the laws and "a miscarriage of justice."

This Court has held that discrimination in the administration of justice, even when the discrimination is not specifically directed toward the person being tried, is a denial of equal protection of the laws. Racial discrimination in the selection of the grand jury by which a Negro is indicted is a denial of equal protection of the laws, and it is unnecessary to require reversal of a conviction, regardless of the fairness with which the trial jury may have

Nature of Prejudice, 168 (1954 Ed.).

Segregation [illegible] not only the perceptions and reasoning of white witnesses, and the deliberations of a white trier of fact, but it affects Negro witnesses equally if not more. It is well known that Negroes in a segregated community often find it inadvisable to tell the truth to white people, so the young Negro soon learns a method of [illegible] to [illegible].

difficult for witnesses, both Negro and white, to testify accurately to the facts regarding Negro defendants, and it is difficult for the trier of fact fairly to weigh the evidence in such cases. Trials under such circumstances must necessarily produce different results, over the long run, than trials which are free of prejudice. It is true that the effects of segregation in the courtroom cannot be directly separated from the effects of segregation elsewhere in the community. The great difference is that the [illegible] court has no control over segregation elsewhere in the community, but it does over segregation in the courtroom. [illegible]

where fair perception, veracity, and free deliberation can prevail. It is absurd to say that segregation in the courtroom has no effect on the protection afforded a Negro defendant by a court. It has obvious effects, which create a denial of equal protection of the laws, and which require reversal of the conviction of a Negro defendant. It is apparent that sanctions other than [illegible] or convictions have failed to end segregation [illegible], and this action therefore [illegible] the [illegible] See Brown v. Board of Education, 347 U.S. 483

[illegible] Moreover, the trial of this case in a [illegible] courtroom is a denial of a fair and impartial tribunal, and thus a denial of due process of law, because the court has a built-in prejudice in the particular case. In this case the judge had to make a number of decisions about the effect of a protest demonstration upon the community, as [illegible] to decide, for example, whether the demonstration was a "breach of the peace" and whether it [illegible] a clear and present danger of a substantial [illegible] These are [illegible] of mixed law and [illegible] for all [illegible] ordinarily [illegible] of discretion.

[illegible]

his opinion about the effects of the demonstration when he said that the courtroom was segregated "in the purpose of maintaining order" (T. 6; Appendix p.), and later that the demonstration of Negroes against segregation in downtown Baton Rouge was an "inherent breach of the peace" (T. 545; Appendix p.). He had no way, moreover, to determine whether integration or advocacy of integration would lead to disorder, because he had already refused to try its effects in the courtroom.

This case presents issues analogous to those raised in Irvin v. Dowd, 366 U.S. 717 (1961). In that case Irvin obtained from this Court a reversal of conviction upon a writ of habeas corpus, because prejudice created against him by publicity made it impossible for him to get a fair trial in the county, a change of venue was denied, and certain

jurors admitted that they had an opinion as to his guilt. In this case, segregation has created a special pattern of prejudice against a person such as Rev. Cox, who protests against it, and the trier of fact, by his administration of a segregated courtroom, has shown that he participates in the prejudice. The judge has demonstrated that he is prejudiced about a central issue in this case, and thus Rev. Cox has been denied a fair and impartial tribunal. See In Re Murchison, 349 U.S. 133 (1955)

The segregation of the courtroom, furthermore, has denied the Rev. Mr. Cox a public trial, within the meaning of the Sixth Amendment. The requirement of a public trial is applicable to trials in state courts under the due process clause of the Fourteenth Amendment, In re Oliver, 333 U.S. 257 (1948). Two of the bases for requirement of a public trial, as outlined by Dean Wigmore, are to discover new witnesses and make existing witnesses disinclined to

falsify. Wigmore, Evidence, Section 1834 (1940 Ed.). These two elements of the requirement have been infrined in this case, where the officers who made a count of the persons present, inside and outside the courtroom, found that colored people were waiting to get in, while seats were empty in the courtroom. (T. 340-341, in the Appendix at pp. 42a-45a). These people, had they been in a fairly administered courtroom, might have influenced the witnesses who appeared toward greater veracity, and more important, they might have included among themselves some further witnesses. To exclude them in a discriminatory way was to deny the petitioner the essential elements of a public trial. Cf. United States v. Kobli, 172 F.2d 919 (3 Cir. 1949).

The trial of Rev. Cox in a courtroom segregated by the act of the judge denied him equal protection of the laws, but more than that, it denied him a fair trial because

he was being tried for a protest against segregation, and it denied him a public trial because a particular group was discriminatorily excluded.

Conclusion

For the foregoing reasons it is respectfully submitted that the judgments of the Louisiana Supreme Court should be reversed.

No. 735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

B. ELTON COX,

Appellant,

against

STATE OF LOUISIANA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

REPLY TO MOTION OF APPELLEE TO AFFIRM AND/OR DISMISS

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ERNEST FINNEY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 735

B. ELTON COX,

Appellant,

against

STATE OF LOUISIANA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

REPLY TO MOTION OF APPELLEE TO AFFIRM AND/OR DISMISS

In its motion to affirm and/or dismiss the appeal in this case, appellee, the State of Louisiana, has largely avoided discussing the errors of constitutional interpretation made by the trial court and the Supreme Court of Louisiana. Appellee has instead attempted to state the facts so as to make it appear that no substantial injustice was done in this case, and counsel for the appellant, Rev. Cox, would like to take this opportunity to correct that impression.

The statements of fact in the motion, and in the opinion of the Louisiana Supreme Court, which are adopted in

the motion, give the impression that violence was imminent and that the demonstrators were causing it. This characterization entirely ignores the fact that every witness testified that Rev. Cox was in complete control of the student demonstrators at all times (T. 38, 107, 257, 318, 355), and that the inspector in charge of police believed that the officers were able to handle "any situation that should arise". The demonstration was orderly (see e.g., T. 267-268), and it followed the program which had been shown to the authorities as well as the instructions given by the Chief of Police (T. 516-517). The only "disorderliness" of the demonstration was the instruction by Rev. Cox to the demonstrators to sit at segregated lunch counters until they were served (T. 364, 376). It is said by the Louisiana Supreme Court that Rev. Cox, in his speech to the students, "built them up emotionally"; the fact is, as the witness agreed, that Rev. Cox counseled non-violence even in the face of violence.

This Court is not the proper forum in which argue over the actual occurrences of the demonstration, but we must point out that the record does not support the contention that this was a situation of imminent violence, to which a narrowly-drawn or narrowly-construed regulatory statute might properly have been applied.

The really important point is that no such narrow statute was applied in this case. The trial court held that it was "inherently dangerous and a breach of the peace" (T. 545) for fifteen hundred colored people to protest in downtown Baton Rouge against segregation. The Louisana Supreme Court defined a breach of the peace in the follow-

ing language: "* * * to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet * * *." Yet this is one of the statutes which are characterized at page 9 of the motion as having a "fixed, definite, and commonly understood meaning * * *." On the contrary, this is language which is so general, under the decisions in *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) and *Terminiello* v. *Chicago,* 337 U. S. 1 (1948), as to act as a restraint on freedom of speech and assembly. In this case, moreover, the language has been deliberately used to restrain peaceful speech and assembly.

Appellee makes much of the fact that the students occupied a large part of the sidewalk across from the courthouse, and that they allegedly "failed to move on" when the sheriff instructed them to do so.* These allegations, however, are at best peripheral to the true issues in this case. It matters very little what Rev. Cox said, in response to the sheriff, because the fact is that the instruction to move on had been given by the sheriff because he disapproved of Rev. Cox's speech advocating a sit-in (T. 364). Whether or not the students occupied the sidewalk matters very little, because the authorities were willing to permit

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* It is claimed that Rev. Cox said "Don't move" when the sheriff instructed the students to move on. This in itself is an extraordinary conclusion to draw from the evidence; only three witnesses recollected this phrase (T. 58, 275, 354) and five others remembered no such thing (T. 82, 106, 286, 315, 373). Rev. Cox himself recollected saying "Don't run" (T. 521ff.) a phrase with an altogether different meaning. The trial judge avoided the whole question by holding that it was "inherently dangerous" for Negroes to demonstrate in front of the courthouse. In the end this dispute over the facts serves only to illustrate the difficulties presented by appellee's characterization of the demonstration.

them to occupy that sidewalk, until Rev. Cox advocated a sit-in. The statutes against breach of the peace and obstructing the sidewalk, whether valid on their face or not, were applied in a discriminatory way, so as to deny to appellant the equal protection of the laws and due process of law. *Niemotko* v. *Maryland,* 340 U. S. 268 (1951).

For the foregoing reasons, and for the reasons stated in the jurisdictional statement, the motion of appellee, the state of Louisiana, should be denied.

Respectfully submitted,

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OPPOSITION TO PETITION FOR REHEARING OF THE DECISIONOF THIS COURT IN REVERSING THE JUDGMENT OF THE SUPREME COURT OF LOUISIANA

Reply to Specification of Error Number 1.

In its first specification of error herein the State of Louisiana argues that this Court erred in finding:

a. That the officials present made an administrative interpretation of the word "near" in the statute involved in this case, L.S.A.-R.S.Sec. 14:401, or that the defendant relied upon it,; ~~or~~ and

b. That a conviction of appellant was entrapment by the state.

In its effort to shew that no administrative interpretation was made of the statute penalizing the obstruction of justice by demonstating "in or near" a courthourse ~~was made~~, the State of Louisiana relies upon the facts that ~~certain~~ police authorities urged Rev. Cox and his group to turn back and disband Before they reached the courthouse (Petition pp. 2, 6), and that ~~[illegible]~~ Chief of Police White stated that he did not mean to give permission for the demostration when he specified that it had to take place on the sidewalk across the street from the courthouse, and within a certain period of time (Petition p. 4).

This argument assumes that the officials had the right to order the demonstration of students to disband, while the demostration was still peaceful, still unformed, and still quite some distance from the courthouse. This, as the opinion of Mr. Justice Goldberg in case Number 24 makes clear, is extremely doubtful, in the absence of a narrowly drawn regulatory statute. That opinion states:

> "We hold that opinion ~~xx~~ Louisiana may not constitutionally punish appellant under this statute for engaging in the type of conduct which this record reveals, and also that the statute as authoritatively interpreted by the Louisiana Supreme Court is unconstitutionally broad in scope."
> (Opinion in case No. 24, p. 8)

And again (p. 21) :

> "But here it is clear that the practice in Baton Rouge of allowing unfettered discretion in local officials in the regulation of the use of the streets for peaceful parades is an unwarranted abridgement of appellants's freedom of speech and assembly secured to him by the First Amendment, as applied to the State by the Fourteenth Amemdment.

¶ While the officials were free to urge Rev. Cox and the students to turn back, it seems doubtful that they had grounds to break up the demonstration, peaceful as it was, before it violated a precisely drawn statute.

¶ Once the march had proceeded up to the Courthouse, Chief of Police White gave instructions as to where it was to deploy and for how long. Chief White may have thought that these were only provisional instructions to avoid ~~violations~~ a disturbance, but a number of witnesses, including but not limited to Rev. Cox, thought they were rules for the conduct of the demonstration.
(T. 101, 371, 516-517, Opinion in case No. 24, p.4)

(No ¶) It is difficult to see what other conclusion those witnesses could have drawn, particularly in view of the fact that Rev. Cox had presented a program for the demostration, to which the Sheriff testified that he had "no objection" (Opinion in Case No.49, p.11).

¶ In short, appellant contends that under the rulings of law made by this Court in Cases No. 24 and 49, the officials of Baton Rouge made correct decisions up to the point where they broke up the demonstration and arrested Rev. Cox. So long as the demonstration was taking place away from the Courthouse, it was

lawful, by the terms of the Louisiana statutes. When it came near the courthouse, it came within the purview of LSA-RS sec. 14: 401. Had the officials made no decision as to the appropriate place for the demonstration near the courthouse, Rev. Cox might himself have made it at his peril. But once the officials had made the decision, they might not arrest him for abiding by it.

¶ The State of Louisiana argues further that the elements of the defense of entrapment are not made out in this case, upon the grounds that "the rationale of the legal concept of entrapment is that officers of the law shall not incite crime merely to punish the criminal."(Petition p. 6) The State of Louisiana attempts to close the circle by showing that there was no "incitement" of Rev. Cox. < the law recognizes

¶ The fact is, however, that ~~there is~~ more than one sort of entrapment. The definition propounded by Louisiana may be adequate to describe entrapment by temptation, but entrapment due to a mistake of law induced by officials is somewhat different. < That defense ~~It~~ does not require "incitement," but rather an official interpretation of law such that a defendant will commit a crime he would not otherwise commit. < Such Entrapment by an induced mistake of law has been recognised < as a defense for many years, Voves v. U. S., 249 Fed. 191 (7 Cir. 1918); Raley v. Ohio, 360 US 423 (1959) The basic evil of entrapment is that it tends to create crime where it would not otherwise exist, and the likelihood of this evil is greatest when, as in this case, a defendant is accused of crime because he has followed a reasonable interpretation of law by officials.

Reply to Specification of Error Number Two

¶ In its second specification of error herein, the State of Louisiana argues that this Court has found the facts anew, and that neither the Supreme Court of Louisiana nor this Court has such power. ~~Passing the question whether this Court has greater powers to find fact than the Louisiana courts have, the fact is that this Court based its decision (a decision of law) that the defendant relied upon the permission of the officials upon the statement of facts in the brief for~~ It is not necessary to reach the question whether this court has greater fact-finding powers than the Louisiana court. The fact is that this court based its decision that the defendant reasonably relied upon permission given by state officials upon the statement of facts as given in the brief for Louisiana.

¶ Furthermore, the statement of facts in the brief and in the opinion of the Louisiana Supreme Court on the point are identical:

> Arriving near the courthouse in the vanguard of the marchers, Rev. Cox was confronted by the Shefiff and and the Chief of Police and was asked what his intentions were. He announced to them that the marchers demonstrating against segregation and their activities would be confined to a few songs, a speech and peaceful demonstrations, the whole which would consume only a few minutes. The sheriff then advised Cox to confine his demonstration to the time mentioned and no more.

State's Brief p. 2, State v. Cox, ~~244 La~~ 156 So 2d 448, 451 (La. 1963)

This Court said (Case No. 49, p11):

> Finally, in its brief before this Court, the State did not contend that permission was not granted. Rather in its statement of the facts and arguments it conceded that the officials gave Cox and his group some time to demonstrate across the street from the courthouse.

¶ This Court based a decision of law upon facts which not only could have been, but were, found by the Louisiana Supreme Court.

For the foregoing reasons, the petition of the State of Louisiana should be in all respects denied.

Respectfully submitted,

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Con't next page

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IN THE SUPREME COURT
OF THE STATE OF LOUISIANA

B. ELTON COX, Appellant,	:	Nos. 46,395 and 46,396
v.	:	
STATE OF LOUISIANA, Appellee	:	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that B. Elton Cox, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment dismissing the application for rehearing on the application for writs of mandamus, certiorari and prohibition, entered in these cases on October 9, 1963.

This appeal is taken pursuant to 28 USC § 1257(2).

Appellant was convicted of the crime of breach of the peace, in violation of L.S.A. - R.S. 14:103.1 and was sentenced to serve four months in jail and to pay a fine of $200.00. Appellant was further convicted of the crime of obstructing the sidewalk, in violation of L.S.A. - R.S. 14:100.1, and was sentenced to serve five months in jail and to pay a fine of $500.00. Appellant is at present enlarged on bail in the sum of $625.00 and $250.00.

II. The clerk will please prepare a transcript of the record in this case, for transmission to the clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Transcript of Record of District Court
2. Envelope of Exhibits
3. Application for writs of certiorari, mandamus and prohibition
4. Opinion of the Supreme Court of Louisiana
5. Application for Rehearing
6. Petition and Order of Stay of Execution

III. The following questions are presented by this appeal:

Whether the Louisiana breach of the peace statute, L.S.A. - R.S. 14:103.1, by reason of its vagueness and uncertainty is repugnant to the due process clause of the Fourteenth Amendment to the Constitution.

Whether the Louisiana breach of the peace statute, L.S.A. - R.S. 14:103.1, as applied to appellant, by infringing his right of free speech and free assembly, and to petition for redress of grievances, denied him due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution.

Whether the Louisiana statute against obstructing the sidewalk, L.S.A. - R.S. 14:100.1, as applied to appellant, by infringing his right of free speech and free assembly, and to petition for redress of grievances, denied him due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution.

Whether appellant was denied equal protection of the laws and due process of law under the Fourteenth Amendment to the Constitution by being tried in a courtroom that was segregated due to state action.

/s/ Carl Rachlin

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Proof of Service

I, CARL RACHLIN, one of the attorneys for B.Elton Cox, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of December, 1963, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the State of Louisiana, appellee herein, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to Sargent Pitcher, Jr., Esq., District Attorney for the Parish of East Baton Rouge, Parish Courthouse, Parish of East Baton Rouge, Louisiana.

/s/ Carl Rachlin

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

B. ELTON COX,

Appellant,

against

STATE OF LOUISIANA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. _____

B. ELTON COX,

Appellant,

against

STATE OF LOUISIANA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Louisiana entered in the above-entitled case on June 28, 1963, which affirmed the verdict of conviction rendered by the District Court for the Nineteenth Judicial District, Parish of East Baton Rouge, Louisiana (hereinafter referred to as the "District Court").

CITATIONS TO OPINIONS BELOW

The oral opinion of the judge of the District Court, given at the end of the trial of this case is unreported and is printed in the Appendix at p. 4a. The opinion of the Supreme Court of Louisiana denying the application for writs of mandamus, certiorari and prohibition, and affirming the judgment of the District Court, reported in — La. —, 156 So. 2d 448 (1963), is printed in the Appendix at p. 10a.

JURISDICTION

Appellant was convicted under the Louisiana breach of the peace statute, L. S. A.-R. S. 14:103.1, and the Louisiana 14:100.1, set out in the Appendix at pp. 1a and 2a. The judgment of the Supreme Court of Louisiana affirming the conviction was entered on June 28, 1963, and rehearing was denied by that Court on October 9, 1963. The jurisdiction of the Supreme Court to review the judgment by appeal in this case is conferred by Title 28 of the United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the decision on appeal in this case: *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Winters* v. *New York,* 333 U. S. 507 (1948); *Saia* v. *New York,* 334 U. S. 558 (1948).

QUESTIONS PRESENTED

Whether the Louisiana breach of the peace statute, Louisiana Statutes Annotated, R. S. 14:103.1, by reason of its vagueness and uncertainty is repugnant to the due process clause of the Fourteenth Amendment to the Constitution.

Whether the Louisiana breach of the peace statute, Louisiana Statutes Annotated, R. S. 14:103.1, as applied to appellant, by infringing his right of free speech and free assembly, and to petition for redress of grievances, denied him due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution.

Whether the Louisiana statute against obstructing the sidewalk, Louisiana Statutes Annotated, R. S. 14:100.1, as applied to appellant, by infringing his right of free speech

and free assembly, and to petition for redress of grievances, denied him due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution.

Whether appellant was denied equal protection of the laws and due process of law under the Fourteenth Amendment to the Constitution by being tried in a courtroom that was segregated due to state action.

STATUTES INVOLVED

The statutory provisions involved are Louisiana Statutes Annotated, R. S. 14:103.1 and R. S. 14:100.1. They are printed in the Appendix at pp. 1a, 2a.

STATEMENT

On December 14, 1961, twenty-three youngsters who were picketing stores in the downtown area of Baton Rouge, Louisiana, in protest against segregation and discrimination against Negroes, were arrested (T. 348, 400, 458)* and were incarcerated in the jail adjacent to the District Courthouse in Baton Rouge (T. 348, 466). Shortly before noon, the following day, students from a nearby Negro college, Southern University,** began to gather about the

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* The transcript of the trial in the District Court, though made by a court stenographer, is not physically part of the record before the Louisiana Supreme Court. To supplement the record, referred to herein by the symbol "R-", the transcript of trial is submitted with this petition and referred to by the symbol "T-".

** While the immediate facts of this case are as stated here, the events were part of a continuous course of conduct in Baton Rouge on December 15, 1961. Petitions for certiorari have been filed with this Court in two other cases arising out of these events. *Moore* v. *Louisiana* (conviction for use of a sound truck) and *Clemmons* v. *CORE,* where the Court of Appeals for the Fifth Circuit vacated an injunction against CORE granted by the U. S. District Court in Baton Rouge, La., 323 F. 2d 54 (5 Cir. 1963).

old Capitol Building in Baton Rouge (T. 251, 437, 510-512). About noon the students marched down to the Courthouse under the leadership of the appellant, the Rev. B. Elton Cox, a field secretary for the Congress of Racial Equality (T. 468, 513). Mr. Cox conferred with the Sheriff, the Chief of Police and other law-enforcement officers, and explained to them that the students intended to demonstrate in protest against segregation and discrimination in the stores and against the arrest of the pickets. He further presented a program for the demonstration (T. 351, 371, 470, 515). The Sheriff stated on cross-examination that he had "no objection" to the demonstration under that program (T. 363-364). The Chief of Police allowed seven minutes for the demonstration (T. 101, 516-517), and limited it to the West side of the street, opposite the Courthouse (T. 371, 516).

The students, more than fifteen hundred of them (T. 51, 71, 269, 313), assembled on the sidewalk on the West side of the street. A curious group of white people gathered on the opposite side of the street (T. 20, 28, 167). More than seventy-five policemen and sheriff's deputies were present, who, according to the inspector who was in charge of the policemen, "could handle any situation that should arise" (T. 329). No violence of any kind occurred during the demonstration; on the contrary, all testimony proved that the Rev. Mr. Cox maintained control of the students at all times (T. 38, 107, 257, 318, 355). In accordance with the program described to the Sheriff the students pledged allegiance to the flag of the United States, recited the Lord's Prayer, exhibited signs protesting segregation and sang freedom songs. In response the students in the

jail (arrested the previous day) began to sing (T. 467). Hearing the prisoners sing, the demonstrators uttered a cheer (T. 54, 60, 353). Mr. Cox made a speech (T. 42, 235, 255, 325, 516-518) which not only contained nothing of violence in it (T. 29, 44, 158, 268, 302), but in fact directly forbade violence (T. 37, 299, 363). Mr. Cox advised that if any of the demonstrators should be attacked, he was not to retaliate. According to Cox's own testimony, with which other witnesses were in agreement (T. 29, 37, 53, 105, 153, 196, 272-3), he said at the close of his speech:

> "* * * all right. It's lunch time. Let's go eat. There are twelve stores we are protesting. A number of these stores have twenty counters, they accept your money from nineteen. They won't accept it from the twentieth counter. This is an act of racial discrimination. These stores are open to the public. You are members of the public. We pay taxes to the Federal Government and you who live here pay taxes to the state." (T. 518)

That was the sticking-point for the Chief of Police and the Sheriff (T. 364, 376), who then commanded the demonstrators to break up the demonstration. Tear gas was released into the crowd, which then broke up immediately (T. 377).

Mr. Cox was arrested and charged with criminal conspiracy, breach of the peace, obstructing the sidewalk, and demonstrating in front of a courthouse with the intent of obstructing justice. The trial took place in the District Court at Baton Rouge, the very building before which the demonstrators had gathered, on January 29 through 31, 1962, without a jury. The criminal conspiracy charge was dismissed, but Cox was convicted on the other three counts.

In the course of his opinion in regard to breach of the peace, the trial judge stated:

> "It must be recognized to be inherently dangerous and a breach of the peace to bring 1,500 people, colored people, down in the predominantly white business district in the City of Baton Rouge and congregate across the street from the courthouse and sing songs as described to me by the defendant as the CORE National Anthem carrying lines such as 'black and white together' and to urge those 1,500 people to descend upon our lunch counters and sit there until they are served. That has to be an inherent breach of the peace * * *". (T. 545; Appendix at pp. 8a-9a)

Cox was sentenced* to serve four months in jail and pay a fine of $200.00, or in default thereof to serve four months additional for breach of the peace, and for obstructing the sidewalk he was sentenced to serve five months in jail and pay a fine of $500.00, or in default thereto to serve five months additional. For obstructing justice he was sentenced to serve one year in jail and to pay a fine of $5000.00, or in default thereof to serve one year additional. The obstructing justice charge has been reviewed in the Louisiana Supreme Court by way of appeal.** The Supreme Court of Louisiana reviewed the convictions for obstructing the sidewalk and breach of the peace by way of applications

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* The Supreme Court of Louisiana reviewed the sentencing procedures in the convictions in these cases for breach of the peace and obstructing the sidewalk, and found them to be invalid, *Cox* v. *Clemmons*, 243 La. 264, 142 So. 2d 794 (1962). The appellant was subsequently resentenced.

** The decision in that case was affirmed by the Supreme Court of Louisiana on November 12, 1963, and petitioner has sought a rehearing in that court.

for supervisory writs of mandamus, certiorari and prohibition,* and it is the denial of these applications for which review is sought in this Court.

The validity of the statutes here involved was called into question because of their repugnance to the Constitution of the United States, and other federal questions were raised in the District Court by a motion to quash prior to trial (R. 16), and by motions in arrest of judgment and for a new trial (R. 30, 35). Each of these motions was denied (R. 42, 48, 56) and together with the opinions of the District Court they appear in the Appendix at pp. 27a, 31a, 36a. In appellant's application to the Louisiana Supreme Court for writs of certiorari, mandamus and prohibition in these cases, the validity of the statutes was again questioned on the ground of repugnancy to the Constitution of the United States. The decision of the Louisiana Supreme Court upheld their validity.

The record is clear that the courtroom was segregated by order of the District Court judge. The judge took judicial notice of this fact, stating:

> "The Court: Also, let the record show that it has been the practice and custom in the East Baton Rouge Parish Courthouse for many, many years, and in the purpose of maintaining order in the courtroom, separate portions are placed in the courtroom for both colored and white, and let the record espe-

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* Under Article VII, Sec. 10, Louisiana Constitution, the Supreme Court of Louisiana has general supervisory powers over inferior courts, but no appeal is available in criminal cases unless a sentence of more than six months or a fine of more than $300.00 has been imposed. Despite the fact that the fine imposed under the obstructing the sidewalk charge was $500.00 the Supreme Court of Louisiana reviewed the case by application for supervisory writs.

> cially show that the judge in this case ordered that half of the seats that were formerly reserved and available for white people are now being occupied and filled by colored people." (T. 5-6, Appendix at pp. 40a-41a)

The Deputy Sheriff in charge of the jail and a second deputy testified as to the composition of the courtroom, the numbers of empty seats reserved for whites, and the number of colored people waiting in the corridors of the courtroom (T. 340-345). These passages in the record appear in the Appendix at pp. 42a-45a. The question of the fairness of the trial was also raised in the motions in the District Court and in the application to the Louisiana Supreme Court.

THE QUESTIONS ARE SUBSTANTIAL

1. Unconstitutionality of Statutes.

The demonstration which occurred in this case is a classic example of a peaceful assembly for the redress of grievances, see *Edwards* v. *South Carolina,* 372 U. S. 229 (1963), and as such it is within the protected area of "free trade in ideas" under the First Amendment. When the legislature or the courts establish a rule of law which may infringe upon the expression of ideas, the law must be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state." *Cantwell* v. *Connecticut,* 310 U. S. 296, 311 (1940), quoted by Harlan, J., concurring in *Garner* v. *Louisiana,* 368 U. S. 157, 202 (1961). Under this standard, as applied in decisions of this court, the breach of the peace statute under which Mr. Cox was convicted, Louisiana Statutes Annotated, R. S. 14:103.1, Appendix at p. 2a, is

invalid by reason of its repugnancy to the right of freedom of speech as embodied in the Due Process Clause of the Fourteenth Amendment to the Constitution. The statute is drawn so as to punish the acts of congregating on a sidewalk and failing to "move on, when ordered so to do by any law enforcement officer * * *", when these acts are done "* * * under circumstances such that a breach of the peace *may be occasioned* thereby * * *" (Emphasis added). The emphasized phrase plainly may be used to punish more than conduct which presents a clear and present danger to the interest of the state, and logically draws within its ambit that free expression of ideas which is protected by the First Amendment. The dangers of such a phrase are clearly evident in this case, where the statute has been used to punish protected speech. A similar phrase was used by the Supreme Court of South Carolina in defining the common-law offense of breach of the peace,* and in *Edwards* v. *South Carolina,* 372 U. S. 229 (1963), this interpretation of the meaning of breach of the peace was held to infringe the rights of demonstrators to freedom of speech and freedom to petition for redress of grievances. See also *Winters* v. *New York,* 333 U. S. 507 (1948).

The clause in the breach of the peace statute which punishes a failure to "* * * move on, when ordered to do by any law enforcement officers * * *" is also repugnant to freedom of speech, since it puts in the hands of law enforcement officers the power to control street demonstrations, while

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* "* * * It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. * * *". 239 S. C. at 343-344, 123 S. E. 2d at 49, quoted in 372 U. S. at 234.

providing no standards for the protection of the peaceful expression of ideas. *Winters* v. *New York,* 333 U. S. 507 (1948).

The vague phraseology of the Louisiana breach of the peace statute thus permits the officers of the state to punish speech even when it is peaceful, on the ground that it may produce disturbance and unrest, exactly as they have done in this case, and it is just this official interference with speech that the First Amendment is intended to prevent. This phraseology further permits spectators who disagree with opinions in a speech to bring it to an end by creating, or even threatening a disturbance. It is clear that the right of freedom of speech may not be limited because of the opposition of spectators. *Terminiello* v. *Chicago,* 337 U. S. 1 (1948).

The interpretation of the breach of the peace statute by the Supreme Court of Louisiana and the Baton Rouge District Court in this case have only served to increase the repugnancy of the statute to the right of freedom of speech. The Supreme Court of Louisiana in 156 So. 2d at 454, in the Appendix at pp. 19a-20a, attempted to distinguish the *Edwards* case, *supra,* on the ground that the conviction in the present case was obtained under a precisely drawn regulatory statute, similar to a traffic law, a situation specifically left open in the *Edwards* case, 372 U. S. 229, 236. In fact, however the Louisiana Supreme Court failed to define the breach of the peace statute as a narrowly drawn regulatory statute, for that court commented upon the statute as follows:

> "LSA—R. S. 14:103.1 is said to be ambiguous for it is not clear whether the prosecution must show an actual disturbance or only circumstances such

> that a distubance may be occasioned. In either event, however, we think there is no ambiguity in that language of the statute for to disturb the peace in Louisiana means '* * * to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet.' Town of Ponchatoula v. Bates, 173 La. 824, 138 So. 851 (1932)" — La. at —, 156 So. 2d at 448, Appendix at p. 22a.

This statute, as interpreted by the highest court of the state, thus punishes speech protected by the First Amendment, under the decision in *Terminiello* v. *Chicago,* 337 U. S. 1 (1948). The terms used by the state court in defining the statute held invalid in that case were similar to the terms used by the Louisiana Supreme Court here, and the rationale used by this Court in deciding that case is equally applicable to the present case:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky v. New Hampshire, supra (315 US pp. 571, 572, 86 L. ed. 1034, 1035, 62 S. Ct. 766), is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." 337 U. S. at 4.

The definition of disturbing the peace used in this case by the judge of the District Court (T. 545, quoted *supra,* p. 6), is even more objectionable under the standard of the *Terminiello* case. The judge there took the position that a mass demonstration against segregation was an "inherent breach of the peace." This rule deliberately restricts and discriminates against speech, however peaceful, which tends to arouse a complacent public from its acceptance of segregation, and such a standard is condemned by *Terminiello.*

The statute against obstructing the sidewalk, Louisiana Statutes Annotated, R. S. 14:100.1, in the Appendix at p. 1a, and the breach of the peace statute as well, were administered by the state and city authorities so as to discriminate against active campaigning for integration of the races. The demonstration in this case was not violent and did not advocate violence, as the officers knew (T. 299, 363, discussed *supra,* p. 5), and it was not on account of violence that the demonstration was broken up. The city and state authorities were willing to permit and did permit the demonstration in this case until the Mr. Cox advocated a sit-in; only then did the demonstration seem to them a disturbance of the peace (T. 364, 376, discussed *supra,* p. 5).* Under the decisions of this Court, to permit a demonstration until it advocates something with which the authorities or the general public disagrees, however emphatically, is a discriminatory application of the law which constitutes both an unwarranted interference with freedom of speech and a denial of equal protection of the laws under

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* The judge of the District Court agreed with them in ruling that demonstrating against segregation by singing a song with the lines, "black and white together", and urging a sit-in is an "inherent breach of the peace" (T. 545, quoted *supra,* p. 6).

the Fourteenth Amendment. See *Niemotko* v. *Maryland,* 340 U. S. 276, 273 (1951), *Terminiello* v. *Chicago,* 337 U. S. 1 (1948).

The question of the repugnancy to the Constitution of the Louisiana statutes involved in this case is a most important and pressing problem. As this Court noted in *Garner* v. *Louisiana,* 368 U. S. 157, 168 (1961), which involved an earlier Louisiana breach of the peace statute, the statutes involved here were passed in the attempt to punish sit-ins and other forms of protest against segregation. The peaceful protest against segregation is surely one of the most important forms of political expression of our time, and the question whether a statute may validly be drawn or administered in such a way as to kill that form of expression is one of the most important problems presented to this Court in this or any other time. Until this question is decided, the Louisiana statutes cast a pall over peaceful protest in the state.*

2. Segregated courtroom.

The segregation in the courtroom at the trial of this case does not present an appealable issue under the rules of this Court, but it does present a most urgent federal question affecting the administration of justice. The case of *Johnson* v. *Virginia,* 373 U. S. 61 (1963), in which this Court reversed the conviction of the defendant, a Negro, for contempt for sitting in the section reserved for whites in a state courtroom, has established the proposition that segre-

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* Two other prosecutions arose out of the events in Baton Rouge on December 15, 1961, in the effort to stifle protest against segregation. *Clemmons* v. *CORE,* 323 F. 2d 54 (5 Cir. 1963); *Moore* v. *Louisiana.* They are discussed above, footnote to p. 3.

gation of a courtroom by state action is a denial of equal protection of the laws.

It is perfectly clear on the record in this case that the courtroom was segregated by action of the judge (T. 5; *supra,* p. 7). The Louisiana Supreme Court distinguished the *Johnson* case on the ground that the defendant here was not the person discriminated against in the courtroom. — La. at —, 156 So. 2d at 456, Appendix at p. 25a.

Left open is the question as to whether the defendant had a fair trial, or could have had one, in a courtroom blatantly administered in an unconstitutional way. In a case such as this, where the trial judge is required to decide whether or not a demonstration against segregation constitutes a clear and present danger to a substantial interest of the state, *Cantwell* v. *Connecticut,* 310 U. S. 296, 307 (1940), a question entailing a large area of discretion about the effects of segregation and integration upon the public mind, the presence of segregation in the courtroom must necessarily affect his decision. If he not only has the segregated courtroom before his eyes, but administers it as well, the effect must be still stronger. If the unconstitutional administration of the court affects its decisions upon the law and the facts, it must be a denial of a fair trial under the Due Process Clause of the Fourteenth Amendment to the Constitution. Cf. *Irvin* v. *Dowd,* 366 U. S. 717 (1961).

The segregation of the courtroom, furthermore, has denied the Rev. Mr. Cox a public trial, within the meaning of the Sixth Amendment. The requirement of a public trial is applicable to trials in state courts under the Due Process Clause of the Fourteenth Amendment, *Re Oliver,* 333 U. S. 257 (1948). Two of the bases for the requirement of a

public trial, as outlined by Dean Wigmore, are to discover new witnesses and make existing witnesses disinclined to falsify. Wigmore on Evidence, Section 1834 (1940 Ed.). These two elements of the requirement have been infringed in this case, where the officers who made a count of the persons present, inside and outside the courtroom, found that colored people were waiting to get in, while seats were empty in the courtroom (T. 340-341, in the Appendix at pp. 42a-45a). These people, had they been in the courtroom might have influenced the witnesses who appeared toward greater veracity, and more important, they might have included among themselves some further witnesses. To exclude them in a discriminatory way was to deny the petitioner the essential elements of a public trial. Cf. *United States* v. *Kobli,* 172 F. 2d 919 (3 Cir. 1949).

The question whether it is a denial of a fair and public trial to try a case, involving freedom of speech about segregation, in a courtroom segregated by state action has not been squarely presented to this court before. It raises very basic questions as to what sanctions ought to be used by the federal government to prevent unconstitutional acts of segregation by the states and what effect such unconsitutional segregation has upon the state administration of criminal justice. It is perfectly clear that this Court has the power to reverse a state conviction, because of the unconstitutional administration of justice, in the effort to impose effective sanctions for the violation of constitutional rights, *Mapp* v. *Ohio,* 367 U. S. 643 (1961), and in a case such as this, where the unconstitutional administration must influence both the decision of the judge and the publicity of the trial, it is essential that the power be used.

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GROSBY PRESS, INC., 30 F

No. .....

IN THE

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TOBER TERM, 1963

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3. ELTON COX,

Appellant,

against

TE OF LOUISIANA,

Appellee.

THE SUPREME COURT OF LOUISIANA

ICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

B. ELTON COX,

Appellant,

against

STATE OF LOUISIANA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Louisiana entered in the above-entitled case on November 12, 1963, affirming a conviction for illegally demonstrating near a courthouse rendered by the District Court for the 19th Judicial District, Parish of East Baton Rouge, Louisiana (hereinafter referred to as the "District Court").

CITATIONS TO OPINIONS BELOW

The oral opinion of the judge of the District Court given at the end of the trial of this case is unreported and is printed in the Appendix at p. 2a. The opinion of the

Supreme Court of Louisiana affirming the judgment of the District Court on appeal, reported in — La. —, is printed in the Appendix at p. 6a.*

JURISDICTION

Appellant was convicted under a Louisiana statute, L. S. A.-R. S. 14:401, prohibiting demonstrations in or near a courthouse of the State of Louisiana, with the intent of interfering with, obstructing or impeding the administration of justice or of influencing any judge, juror, witness or court officer in the discharge of his duty, which is set out in the Appendix at p. 1a. The judgment of the Supreme Court of Louisiana affirming the conviction was entered on November 12, 1963, and rehearing was denied by that court on December 20, 1963. The jurisdiction of this court to review the judgment by appeal in this case is conferred by Title 28 of the United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the decision on appeal in this case: *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Winters* v. *New York,* 333 U. S. 507 (1948); *Herndon* v. *Lowry,* 301 U. S. 242 (1937).

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* The Rev. Mr. Cox was convicted on two other counts, for obstructing the sidewalk and breach of the peace at the same trial in the District Court. These convictions were reviewed by the Supreme Court of Louisiana on supervisory writs of mandamus certiorari and prohibition, pursuant to Article VII, Section 10, of the Louisiana Constitution. The convictions were affirmed, La. , 156 So. 2d 448 (1963), and a jurisdictional statement for appeal was filed in this Court on January 8, 1964.

QUESTIONS PRESENTED

Whether the Louisiana statute regarding parades in or near a courthouse, L. S. A.-R. S. 14:401, by reason of its vagueness and uncertainty, is repugnant to the due process clause of the Fourteenth Amendment to the Constitution.

Whether the Louisiana statute regarding parades in or near a courthouse, L. S. A.-R. S. 14:401, as interpreted and applied to appellant by the courts of Louisiana, is repugnant to the due process clause of the Fourteenth Amendment to the Constitution, because it infringes his right of free speech and free assembly, and to petition for redress of grievances.

Whether the discriminatory application of the Louisiana statute regarding parades in or near a courthouse L. S. A.-R. S. 14:401, has denied appellant the equal protection of the laws under the Fourteenth Amendment to the Constitution.

Whether appellant was denied equal protection of the laws and due process of law under the Fourteenth Amendment to the Constitution by being tried in a court room that was segregated due to state action.

STATUTES INVOLVED

The statutory provision involved is Louisiana Statutes Annotated, R. S. 14:401. It is printed in the Appendix at p. 1a.

STATEMENT

On December 14, 1961, twenty-three youngsters who were picketing stores in the downtown area of Baton Rouge, Louisiana, in protest against segregation and discrimination against Negroes, were arrested (T. 348, 400, 458)* and were incarcerated in the jail adjacent to the District Courthouse in Baton Rouge (T. 348, 466). Shortly before noon the following day, students from a nearby Negro college, Southern University, began to gather about the old Capitol Building in Baton Rouge (T. 251, 437, 510-512). None of the twenty-three arrested the previous day was being tried or arraigned at that time (T. 201-203, 346-347). About noon the students marched down to the Courthouse under the leadership of the appellant, the Rev. B. Elton Cox, a field secretary for the Congress of Racial Equality (T. 468, 513). Mr. Cox conferred with the Sheriff, the Chief of Police and other law-enforcement officers, and explained to them that the students intended to demonstrate in protest against segregation and discrimination in the stores and against the arrest of the pickets. He further presented a program for the demonstration (T. 351, 371, 470, 515). The Sheriff stated on cross-examination that he had had "no objection" to the demonstration under that program (T. 363-364). The Chief of Police allowed seven minutes for the demonstration (T. 101, 516-517), and lim-

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* The transcript of the trial in the District Court, though made by a court stenographer, is not physically part of the record before the Louisiana Supreme Court. To supplement the record, referred to herein by the symbol "R-", the transcript of trial which was submitted to this Court in a companion case, *Cox* v. *Louisiana,* is referred to by the symbol "T-".

ited it to the West side of the street, opposite the Courthouse (T. 371, 516).

The students, more than fifteen hundred of them (T. 51, 71, 269, 313), assembled on the sidewalk on the West side of the street. A group of curious white people gathered on the opposite side of the street (T. 20, 28, 167). More than seventy-five policemen and sheriff's deputies were present, who, according to the inspector who was in charge of the policemen, "could handle any situation that should arise" (T. 329). No violence of any kind occurred during the demonstration; on the contrary, all testimony proved that the Rev. Mr. Cox maintained control of the students at all times (T. 38, 107, 257, 318, 355). In accordance with the program described to the Sheriff the students pledged allegiance to the flag of the United States, recited the Lord's Prayer, exhibited signs protesting segregation and sang freedom songs. In response the students in the jail (the same ones who had been arrested the previous day) began to sing (T. 46), and, upon hearing the prisoners, the demonstrators uttered a cheer (T. 54, 60, 353). Mr. Cox made a speech (T. 42, 235, 255, 325, 516-518) which not only contained nothing of violence in it (T. 29, 44, 158, 268, 302), but in fact directly forbade violence (T. 37, 299, 363). Mr. Cox advised that if any of the demonstrators should be attacked, he was not to retaliate. According to Cox's own testimony, with which other witnesses were in agreement (T. 29, 37, 53, 105, 153, 196, 272-3), he said at the close of his speech:

> "* * * all right. It's lunch time. Let's go eat. There are twelve stores we are protesting. A number

> of these stores have twenty counters, they accept your money from nineteen. They won't accept it from the twentieth counter. This is an act of racial discrimination. These stores are open to the public. You are members of the public. We pay taxes to the Federal Government and you who live here pay taxes to the state." (T. 518)

That was the sticking-point for the Chief of Police and the Sheriff (T. 364, 376), who then commanded the demonstrators to break up the demonstration. Tear gas was released into the group of students, and it then broke up immediately (T. 377).

Mr. Cox was arrested and charged with criminal conspiracy, breach of the peace, obstructing the sidewalk, and demonstrating in front of a courthouse with the intent of interfering with obstructing and impeding the administration of, or of influencing a judge, witness or court officer. The trial took place without a jury on January 29 through 31, 1962, in the District Court at Baton Rouge, the very building before which the demonstrators had gathered. The criminal conspiracy charge was dismissed, but Cox was convicted on the other three counts. In the course of his opinion in regard to obstructing justice by demonstrating in or near a courthouse, the judge said:

> "Now, what do people do when they come and parade in front of the Courthouse? I was not a witness to the demonstration myself personally, but I was present in the Courthouse shortly before it occurred. I was present in this Courthouse when evidently the police had gotten notice that some demonstration

was impending, and my reaction was to get away from it as fast as I could. If you asked me what I was afraid of, I can tell you best by saying that having lived here in the South all of my life and being present around a demonstration of some 1,500 colored people who are protesting against racial discrimination and being a part of this community and living in this community where I know that especially of late that there is tension between the races, I felt that it would be unpleasant in some way or it would be some unpleasant thing to me to see; and because I know that there is tension between the races, I think I felt apprehensive that trouble or violence could erupt from such a situation. That is what I felt in my heart and that is why I left, because I didn't want to be anywhere near or in connection with it. I can say that it had influence on me. I can say that it made me fearful. Perhaps a better word would be 'apprehensive,' that there might be some racial violence. I can say as a judge that that is the way I felt. With all my heart I can say that. Then when I try to think of, if you want to protest, why protest around the Courthouse, I get the feeling that there is some subtle intimidation of me or of anyone of us who is responsible for upholding the laws of the State of Louisiana and maintaining, according to certain of our laws, segregation." (T. 547-49; Appendix at pp. 3a-4a)

For obstructing justice, Cox was sentenced* to serve one year in jail and pay a fine of $5,000.00, or in default thereof

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* The Supreme Court of Louisiana reviewed the sentencing procedure in this case, and found it to be invalid. *State* v *Cox,* 243 La. 917, 148 So. 2d 600 (1962). The appellant was subsequently resentenced.

to serve one year additional. The obstructing justice charge was reviewed in the Louisiana Supreme Court by way of appeal, and the conviction was affirmed. It is this conviction of which review is sought in this Court.*

The validity of the statute here involved, L. S. A.-R. S. 14:401, was called into question because of its repugnancy to the Constitution of the United States, and other questions were raised in the District Court by a motion to quash (R. 22) motion in arrest of judgment (R. 13) and a motion for a new trial (R. 18). Each of these motions was denied, and together with the opinions of the District Court (R. 26, 31, 37), they appear in the Appendix at pp. 22a-35a. In appellant's appeal to the Louisiana Supreme Court from the conviction of obstructing justice, the validity of the statute was again questioned on the ground of repugnancy to the Constitution of the United States. The decision of the Louisiana Supreme Court was in favor of the validity of the statute.

The record is clear that the courtroom was segregated by order of the District Court judge. The judge took judicial notice of this fact, stating:

> "The Court: Also, let the record show that it has been the practice and custom in the East Baton

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* For breach of the peace and obstructing the sidewalks, Cox was sentenced to serve a total of nine months in jail, and pay a fine of $700.00, or in default thereof to serve nine months additional. The Supreme Court of Louisiana reviewed the convictions by way of application for writs of mandamus certiorari and prohibition, the convictions were affirmed, *State* v. *Cox,* — La. —, 156 So. 2d 448 (1963), and a notice of appeal to this court has been filed.

> Rouge Parish Courthouse for many, many years, and in the purpose of maintaining order in the courtroom, separate portions are placed in the courtroom for both colored and white, and let the record especially show that the judge in this case ordered that half of the seats that were formerly reserved and available for white people are now being occupied and filled by colored people." (T. 5-6, Appendix at pp. 36a-37a)

The Deputy Sheriff in charge of the jail and a second deputy testified as to the composition of the courtroom, the numbers of empty seats reserved for whites, and the number of colored people waiting in the corridors of the courtroom (T. 340-345). These passages in the record appear in the Appendix at pp. 36a-41a. The question of the fairness of the trial was also raised in the motions in the District Court and in the application to the Louisiana Supreme Court.

THE QUESTIONS ARE SUBSTANTIAL

1. Unconstitutionality of Statute

The non-violent demonstration which occurred in this case across the street from the District Courthouse in Baton Rouge is, like other peaceful forms of expression, part of the "free trade in ideas" which is protected by the guarantee of freedom of speech and of assembly in the First Amendment. *Edwards* v. *South Carolina,* 372 U. S. 229 (1963). A statute which may affect an area of protected expression must be "* * * narrowly drawn so as to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State * * *"

Cantwell v. *Connecticut,* 310 U. S. 296, 311 (1940). This standard is not altered by the simple fact that the demonstration in this case took place across the street from a courthouse and partly in protest against an arrest of prisoners incarcerated in a jail attached to the courthouse. This Court has many times dealt with the constitutional problem presented in this case, that of reconciling the right of the courts to be free of intimidation with the right of freedom of expression "* * * in the broadest scope compatible with the supremacy of order * * *." *Pennekamp* v. *Florida,* 328 U. S. 331, 334 (1946). While the present case, that of criminal sanctions for a protest against an arrest, has not been presented to this Court, the same constitutional question has been presented in the cases concerning the sanction of contempt for protest against actions taken by courts in cases pending before them. In a long line of cases, this Court has held that the standard to be applied in determining whether an expression of opinion upon a pending case may be punished by the state is whether that expression presents a clear and present danger to the administration of justice. *Wood* v. *Georgia,* 370 U. S. 375 (1962); *Craig* v. *Harney,* 331 U. S. 367 (1947); *Pennekamp* v. *Florida,* 328 U. S. 331 (1946); *Bridges* v. *California,* 314 U. S. 252 (1941). The standard applicable in such cases was clearly stated in *Craig* v. *Harney, supra,* and was reaffirmed in *Wood* v. *Georgia, supra*:

> "The fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not

be remote or even probable; it must immediately imperil." 331 U. S. at 376, 370 U. S. at 385.

The Louisiana statute prohibiting demonstrations in or near a courthouse "with the intent of interfering with, obstructing or impeding the administration of justice, or with the intent of influencing any judge, juror, witness or court officer, in the discharge of his duty" is unconstitutional on its face under the rigorous standard of clear and present danger established by this Court in cases involving protests directed at the administration of justice. Each of the publications found by this Court to be protected under the First Amendment in cases of contempt by publication, e.g., *Pennekamp* v. *Florida,* 332 U. S. 331, 346 (1946), was intended as a protest against some aspect of the administration of justice in the hope of affecting that administration, whether directly or indirectly. The phrase "with the intent of influencing any judge, witness or court officer in the discharge of his duty" would cover those cases of contempt. On its face, therefore, the phrase includes forms of expression which are protected by the First Amendment and it is an infringement of the freedom of speech. *Winters* v. *New York,* 333 U. S. 507 (1948).

This infirmity in the language of the statute the courts of Louisiana might perhaps have cured, see *Winters* v. *New York, supra,* either by limiting the application of the statute as a whole to situations which present a clear and present danger to the administration of justice, or by limiting the meaning of the "intent" necessary to this statute to such situations. Cf. *American Communications Association* v. *Douds,* 339 U. S. 382, 407-408 (1950).

The courts of Louisiana failed to take either course. In considering the statute as a whole, the judge of the Louisiana District Court said that he had the "feeling" that the demonstration was "* * * some subtle intimidation of me or of anyone of us who is responsible for upholding the laws of the State of Louisiana * * *" (Appendix at p. 4a). He did not consider whether the protest presented a clear and present danger to the administration of justice, nor whether it could possibly have presented such a danger, at a time when the prisoners were not being arraigned or tried before his court.

In affirming the decision of the District Court, the Louisiana Supreme Court failed in its turn to apply a constitutionally acceptable standard. It held only that the state has a legitimate right under its police power to protect the impartial administration of justice, without recognizing that the police power is limited in such cases to averting clear and present danger to the administration of justice. In this connection, the Louisiana Court said:

> "In considering similar contentions urged in the two companion cases, we recognized as did the court below, that under decisions of the Supreme Court of the United States the freedoms guaranteed individuals under the First Amendment are protected by the Fourteenth Amendment from invasion by the states, citing a number of authorities whereby this country's highest court established this rule in the jurisprudence. But we also pointed out that the United States Supreme Court has recognized that the right of freedom of speech and the press is not

absolute and held that a state may, by general and nondiscriminatory legislation, regulate the exercise of that freedom under its police power. *Cantwell* v. *Connecticut,* 310 U. S. 296.

"Unquestionably these rights, freedoms or privileges of peaceful assembly and of expression and discussion—however they may be considered—as well as the impartial administration and justice that is guaranteed under the Sixth Amendment to the Constitution of the United States, are all vital and important to the concepts on which this nation was founded. To paraphrase Mr. Justice Frankfurter in his concurring opinion in *Pennekamp* v. *Florida,* the claims with which we are faced are not those of right and wrong, but of two rights, each highly important to the well being of society, the core of the problem being to arrive at a proper balance between basic conditions of our constitutional republic—freedom of utterance and peaceful assembly on the one hand, and the proper and impartial administration of justice on the other, and since the latter is one of the chief tests of the true concepts of our constitutional government, it should not be made unduly difficult by irresponsible actions." — La. at —, Appendix at p. 10a.

This construction of the statute, like that of the District Court, is so broad as to draw within its scope protected forms of speech, because it fails to limit the effect of the statute to cases which present a clear and present danger to the administration of justice.

In defining intent in the clause: "*with the intent* of interfering with, obstructing, or impeding the administra-

tion of justice, or *with the intent* of influencing any judge, juror, witness or court officer in the discharge of his duty" (emphasis supplied), the Louisiana courts again ran afoul of standards set forth in the decisions of this Court. The meaning of this phrase could have been narrowed so as to include only situations in which the accused, by unmistakable acts, shows his intention to affect the outcome of a case or otherwise interfere with the administration of justice. See *Yates* v. *United States,* 354 U. S. 298, 318 (1957) (narrow construction of the meaning of "teaching and advocacy" under the Smith Act so as to cover only situations which present a clear and present danger); *Winters* v. *New York,* 333 U. S. 507 (1948). The decisions of the Louisiana courts exclude such a narrow interpretation, however. This is not a case in which the demonstration was intended to disrupt a trial, and nothing was said during the demonstration which was construable as intimidation of any court. The prisoners whose incarceration was being protested were not on trial, and their trial was not immediately in prospect (T. 201-203). All the witnesses both for the prosecution and the defense agreed that the purpose of the protest demonstration was peaceful (T. 29, 37, 44, 158, 268, 299, 302, 363). Yet both the District Court and the Louisiana Supreme Court found that the necessary intent to obstruct justice or influence an officer of the court was proven. Both courts in effect found *ipso facto* that any demonstration near a courthouse in protest against an arrest, regardless whether the trial of the person arrested is in progress or even imminent, is enough to make out the necessary intent. This ruling utterly fails to restrict the

meaning of intent to obstruct justice or influence a court officer to situations which present a clear and present danger to the administration of justice. Such a vague definition of intent as has been applied here by the Louisiana courts acts as an unconstitutional restraint of freedom of speech. *Pennekamp* v. *Florida,* 328 U. S. 331, 347 (1946).

The construction by the District Court and the Louisiana Supreme Court of the statute as a whole, and of the clause regarding intent in particular, is so general, in the end, as to render the statute too vague and indefinite to give fair notice of what acts may be punished under the statute. It is plain that the statute cannot punish speech which is protected by the First Amendment. It is therefore impossible under the interpretations of the District Court and the Louisiana Supreme Court for any person to ascertain what conduct is prohibited by the statute. *Winters* v. *New York,* 333 U. S. 507 (1948); *Herndon* v. *Lowry,* 301 U. S. 242, 261 (1937).

The only evidence of a danger to the administration of justice or of intent to obstruct justice or influence an officer of the court presented against the Rev. Mr. Cox was the simple fact that he had led a protest, in a manner prescribed by the police, across the street from a courthouse in protest against the arrest of prisoners then incarcerated in the jail attached to the courthouse. To treat this simple demonstration as evidence of such a danger or of intent to obstruct justice would infringe the right of freedom of speech, *Pennekamp* v. *Florida,* 328 U. S. 331, 347 (1946), and thus Mr. Cox has been convicted without evidence of any crime which could constitutionally be proscribed by the legislature

of Louisiana. Such a conviction constitutes a denial of due process of law under the Fourteenth Amendment. *Thompson* v. *Louisivlle,* 362 U. S. 199 (1960), *Garner* v. *Louisiana,* 368 U. S. 157 (1961); *Taylor* v. *Louisiana,* 370 U. S. 154 (1962).

While this statute has not previously been construed by the Supreme Court of Louisiana, we must assume that merely demonstrating to protest an arrest is not, "because it could not be", *Thompson* v. *Louisville,* 362 U. S. 199, 206 (1960), enough to show a clear and present danger to the administration of justice or of intent to obstruct justice or influence an officer of the court. Concepts applied by the Louisiana Supreme Court in analogous cases support this. In *Graham* v. *Jones,* 200 La. 137, 159, 171, 179, 183, 7 So. 2d 688, 695, 699, 702, 703 (1942), the clear and present danger rule outlined by this Court in *Bridges* v. *California,* 314 U. S. 252 (1941) was applied to dismiss five convictions for contempt by publication. In *State* v. *Daniels,* 236 La. 998, 109 So. 2d 896 (1959), a rigorous standard of intent was required for a statute similar to the one in this case. In that case the defendant, a convict who had struck a prison guard, was charged with the crime of "Public Intimidation", being the use of force upon a public officer "with the intent to influence his conduct in relation to his position, employment, or duty." L. S. A.-R. S. 14:122. The Louisiana Supreme Court reversed the conviction on the ground that merely to have struck the guard was not enough to show the required intent. The Louisiana Supreme Court has failed in this case to apply the rigorous standard for clear

and present danger and for intent which it has established in similar cases, and it has thus affirmed a conviction of crime based upon no evidence of any acts which might be punished as criminal under the United States Constitution or the laws of Louisiana.

Discriminatory Administration of the Law

Passing from the construction of the statute involved here to the manner of its administration, the facts in this case show that the statute was used by the state and city auhorities to discriminate against active campaigning for integration of the races. The demonstration in this case was carried out in the manner prescribed by the chief of police and the sheriff, and they were willing to permit and did permit the demonstration until Mr. Cox advocated a sit-in at lunch-counters; only then did the demonstration seem to them a violation of law (T. 364, 376). Under the decisions of this Court, to permit a demonstration until it advocates ideas with which the authorities or the general public disagree is a discriminatory application of the law which constitutes both an interference with freedom of speech and a denial of equal protection of the laws under the Fourteenth Amendment. See *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886); *Terminiello* v. *Chicago,* 337 U. S. 1 (1948).

The question of the repugnancy to the Constitution of the Louisiana statute concerning demonstrations in or near a courthouse, L. S. A.-R. S. 14:401 both on its face and as applied, is a most important and pressing problem. Like

the breach of the peace statute under which the Rev. Mr. Cox has been convicted in the companion case to this, arising out of the same demonstration,* the statute in this case is a powerfully repressive influence on freedom of speech. The peaceful protest against segregation is surely one of the most important means of political expression of our time, and the question whether a statute may validly be drawn or construed and applied in such a way as to kill that form of expression is one of the most important problems before this Court. Unless the decision of the Supreme Court of Louisiana is reversed, it will act as a prior restraint on speech against racial discrimination. *Smith* v. *California,* 361 U. S. 147 (1959).

2. Segregated courtroom

The segregation in the courtroom at the trial of this case, though it presents no appealable issue under 28 United States Code §1257(2), does present a most urgent federal question affecting the administration of justice. The case of *Johnson* v. *Virginia,* 373 U. S. 61 (1963), in which this Court reversed the conviction of the defendant, a Negro, for contempt for sitting in the section reserved for whites in a state courtroom, has established the proposition that segregation of a courtroom by state action is a denial of equal protection of the laws.

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* A jurisdictional statement for appeal to this Court was filed on January 8, 1964. The statute mentioned is L. S. A.-14:103.1 (1960).

It is perfectly clear on the record in this case that the courtroom here, like that in the *Johnson* case, was segregated by action of the judge (T. 5; *supra,* p. 8). In the companion case to the present one, the Louisiana Supreme Court distinguished the *Johnson* case on the ground that the defendant here was not the person discriminated against in the courtroom. — La. at —, 156 So. 2d 448, 456 (1963) Appendix at p. 20a. This decision begs the question whether racial discrimination against persons in the courtroom is not also discrimination against the defendant. It leaves open entirely the question whether the appellant here had a fair trial, or could have had one, in a courtroom blatantly administered in an unconstitutional way. Whether or not a court may have the objectivity necessary for the administration of due process of law when trying one who protests against segregation and discrimination where the judge himself maintains a segregated courtroom is a question which should be, we urge, decided by this Court.

It is evident, at the outset, that a denial of equal protection of laws in the administration of justice is a denial of equal protection of the laws to the defendant tried under such administration, see *Eubanks* v. *Louisiana,* 356 U. S. 584 (1958) (discrimination in selection of grand and petit jury). Moreover, in the cases of demonstrations against segregation, this unconstitutional administration of justice is a denial of due process of law for the reason that it affects the decision of the trial court. In a case such as this, where the trial judge is required to decide whether or not a demonstration against segregation constitutes a clear and present danger to the administration of justice, *Wood* v.

Georgia, 370 U. S. 375, 385 (1962), a question entailing a large area of discretion about the effects of segregation and integration upon the public mind, the presence of segregation in the courtroom must necessarily affect his decision. If he not only has the segregated courtroom before his eyes, but administers it as well, as he did here (T. 5, *supra,* p. 8), the effect is still stronger. If the unconstitutional administration of the court affects its decisions upon the law and the facts, it is a denial of a fair trial under the due process clause of the Fourteenth Amendment to the Constitution. Cf. *Irvin* v. *Dowd,* 366 U. S. 717 (1961).

The segregation of the courtroom, furthermore, has denied the Rev. Mr. Cox a public trial, within the meaning of the Sixth Amendment. The requirement of a public trial is applicable to trials in state courts under the due process clause of the Fourteenth Amendment, *Re Oliver,* 333 U. S. 257 (1948). Two of the bases for the requirement of a public trial, as outlined by Dean Wigmore, are to discover new witnesses and make existing witnesses disinclined to falsify. Wigmore on Evidence, Section 1834 (1940 Ed.). These two elements of the requirement have been infringed in this case, where the officers who made a count of the persons present, inside and outside the courtroom, found that colored people were waiting to get in, while seats were empty in the courtroom (T. 340-341, in the Appendix at pp. 38a-41a). These people, had they been in the courtroom, might have influenced the witnesses who appeared toward greater veracity, and more important, they might have included among themselves some further wit-

nesses. To exclude them in a discriminatory way was to deny the petitioner the essential elements of a public trial. Cf. *United States* v. *Kobli,* 172 F. 2d 919 (3 Cir. 1949).

The question whether it is a denial of equal protection of the laws and of a fair and public trial to try a case involving freedom of speech about racial discrimination in a courtroom segregated by state action, has not been squarely presented to this court before. It raises very basic questions as to what sanctions ought to be used by the federal government to prevent unconstitutional acts of segregation by the states and what effect such unconstitutional segregation has upon the state administration of criminal justice. This Court has the power to reverse a state conviction, because of the unconstitutional administration of justice, in the effort to impose effective sanctions for the violation of constitutional rights, *Mapp* v. *Ohio,* 367 U. S. 643 (1961), and in a case such as this, where the unconstitutional administration must influence both the decision of the judge and the publicity of the trial, it is essential that the power be used.

It is submitted that the statute here involved, L. S. A.-R. S. 14:401, like the statutes involved in the companion case arising out of the same demonstration, is repugnant to the right of freedom of speech under the Constitution of the United States, and that the decision of the Louisiana Supreme Court in favor of the validity of this statute is in error. It is further submitted that this statute has been administered in a manner which denied to appellant due process of law and equal protection of the laws. We believe

that the questions presented by this appeal are substantial and of the utmost public importance.

Respectfully submitted,

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

B. ELTON COX,

Appellant,

against

STATE OF LOUISIANA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

APPENDIX TO JURISDICTIONAL STATEMENT

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Statutes Involved

LOUISIANA STATUTES ANNOTATED—R. S. 14.401

"§401. DEMONSTRATIONS IN OR NEAR BUILDING HOUSING A COURT OR OCCUPIED AS RESIDENCE BY JUDGE, JUROR, WITNESS OR COURT OFFICER

"Whoever, with the intent of interfering with, obstructing or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty pickets or parades in or near a building housing a court of the State of Louisiana, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any soundtruck or similar device or resorts to any other demonstration in or near such building or residence, shall be fined not more than five thousand dollars or imprisoned not more than one year, or both.

"Nothing in this section shall interfere with or prevent the exercise by any court of the State of Louisiana of its power to punish for contempt. Acts 1950, No. 177, §§ 1, 2."

Opinion of District Court

DECISION

(545)

* * *

With regard to bill No. 42,201, that is where B. Elton Cox is charged that he:

(546)

> ". . . unlawfully violated the provisions of R. S. 14:401, in that he, with the intent of interfering with, obstructing, and impeding the administration of Justice, and with the intent of influencing a Judge, witnesses and Court Officers in the discharge of their duty, did picket, parade and engage in a demonstration in front of and near the East Baton Rouge Parish Courthouse, a building housing a Court of the State of Louisiana and occupied and used by such Judges, witnesses and Court Officers."

Mr. Jones has filed into the record this map which shows that the group which Reverend Cox led to the west side of America Street could not have been more than 103 feet from the steps of the courthouse to where his group was congregated directly across the street. That would be 103 feet and the Court feels that that would qualify under the definition of being near. With regard to the evidence as to whether or not he was the leader of the said group, he was the one who dealt with the officers, he is the Field Secretary of the Congress of Racial Equality and the evidence, not only from his own testimony but from Ronnie Moore and others of his affiliation with CORE, leaves no doubt in this Court's mind that he was the leader of the group

across the street from the Courthouse. That is also accurately reflected in the films. The real question, though, in
(547)
that statute is with regard to the intent. The bill charges "... in that he, with the intent of interfering with, obstructing, and impeding the administration of Justice, and with the intent of influencing a Judge . . . ." I asked many questions of the accused and others such as Ronnie Moore as to just what did they propose to accomplish by congregating on the other side of the Courthouse, on the street on the other side of the Courthouse, singing these songs and protesting the "illegal incarceration" of their fellow members in the East Baton Rouge Parish jail.

The defense is that they had no intent to influence anyone, that this is just mere freedom of speech, that this is their right to protest out against anything which they happen to think is a social wrong and a social injustice. Of course, even our Federal Government has recognized the danger of freedom of speech expressed in this manner and has made it a violation of Federal law to picket and parade and engage in a demonstration in front of or around a Federal Court. Our state statute, which was copied after the Federal statute, was enacted even before the Supreme Court issued its initial school integration decision. This statute was on our books in the year 1950, long before the school integration decision, and was copied after the Federal statute.

Now, what do people do when they come and parade in
(548)
front of the Courthouse? I was not a witness to the demonstration myself personally, but I was present in the Court-

house shortly before it occurred. I was present in this Courthouse when evidently the police had gotten notice that some demonstration was impending, and my reaction was to get away from it as fast as I could. If you asked me what I was afraid of, I can tell you best by saying that having lived here in the South all of my life and being present around a demonstration of some 1,500 colored people who are protesting against racial discrimination and being a part of this community and living in this community where I know that especially of late that there is tension between the races, I felt that it would be unpleasant in some way or it would be some unpleasant thing to me to see; and because I know that there is tension between the races, I think I felt apprehensive that trouble or violence could erupt from such a situation. That is what I felt in my heart and that is why I left, because I didn't want to be anywhere near or in connection with it. I can say that it had influence on me. I can say that it made me fearful. Perhaps a better word would be "apprehensive," that there might be some racial violence. I can say as a judge that that is the way I felt With all my heart I can say that. Then when I try to think of, if you want to protest, why protest around the Courthouse, I get the feeling that there is some subtle intimidation of me or of anyone of us who is responsible for upholding the laws of the State
(549)
of Louisiana and maintaining, according to certain of our laws, segregation.

For example, Mr. Jones, who has practiced law in my court for some time with success, sometimes without, well

knows that Division "B" and every other division up here has been segregated. He well knows that, and I think he also knows, too, that if I would just say to everybody white and colored, "Let's just all mix up together in the courtroom at the same time," I think that it would be calculated to cause disorder in court. Maybe some time that situation might not be, but he ought to know and I do know right now that it would cause disorder. When he makes such a statement in the presence of a courtroom almost entirely filled with colored persons and knowing the situation as he does, I think this is some intimidation of me. The Court gave half the section that was usually reserved for whites to the colored spectators in addition to the half that they have always customarily had, and he intimates that the Court is being unfair by allowing this trial to go on in a segregated courtroom. Yes, I feel that there is some intimidation of me, especially when there are some 250 colored people standing in the halls outside waiting to get in and overcrowd this courtroom when there is no place for them to sit if I gave them the whole courtroom.

In any event, I felt as a judge the subtle intimidation, (550)
and while I know that he protests bitterly against it as merely a freedom of his speech, I am sure when our Federal Government devised this statute which our state has copied that perhaps the Communists must have felt the same way.

Therefore, the Court finds the defendant B. Elton Cox guilty of bill No. 42,201.

* * *

Opinion of Louisiana Supreme Court

(1)

SUPREME COURT OF LOUISIANA

No. 46,618

STATE OF LOUISIANA

v.

B. ELTON COX

APPEAL FROM DIVISION "A" OF THE NINETEENTH JUDICIAL DISTRICT COURT

HON. FRED A. BLANCHE, JR., JUDGE

FOURNET, Chief Justice.

This case was previously before us on an appeal taken by the defendant, B. Elton Cox, but the bills reserved during his trial were not then considered inasmuch as the only question presented for determination was the legality of the sentence imposed. Finding he had been sentenced within twenty-four hours after his conviction, contrary to the provisions of R. S. 15:521, the sentence was annulled and set aside, the defendant ordered released on bail until such time as legal sentence was imposed, and, in the meanwhile, he was afforded the opportunity to take any pro-

cedural steps to which he was entitled during the delay provided by that statute. See, State v. Cox, 243 La. 917, 148 So. 2d 600.[1]

(2)

This appeal is from the defendant's conviction of violating Section 14:401 of the Revised Statutes of 1950[2] and his sentence thereunder to "pay a fine of $5,000 and to be confined in the parish jail for one year, or in default of the payment of said fine to be imprisoned one year additional, this sentence to run consecutively with" the sentences that day imposed under two other convictions that were affirmed by this court in a decision handed down June 28, 1963. State v. Cox, — La. —, 156 So. 2d 448. The defendant in this case, as in the companion case, is relying for the reversal of his conviction and sentence on five Bills of Exceptions reserved and perfected during the trial, although in

---

[1] For the same reason the sentences originally imposed following his conviction under two other statutes were set aside on writs granted to review this action by the trial judge. See, State ex rel. Cox v. Clemmons, 243 La. 264, 142 So. 2d 794.

[2] R. S. 14:401 is in that section of our criminal code dealing with "Offenses Affecting Law Enforcement." Its pertinent portion provides: Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the State of Louisiana, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than five thousand dollars or imprisoned not more than one year, or both."

the record they are not numbered and considered in the order in which they were reserved.[3]

These three charges, as well as a charge of criminal conspiracy under R. S. 14:26 of which this defendant was exonerated by the trial judge, grew out of the same incident and were, by agreement, consolidated for trial, the evidence adduced at that time being made applicable to all. The basic attack on the legality of the conviction is, in essence, identical in all three cases, the only material difference being the facts and contentions specifically applicable to the charges under the statute involved in each.

(3)

In considering these companion cases we found it difficult, as we do here, to answer the arguments of defense counsel without a great deal of duplication and repetition, particularly since the last two bills include the contentions raised in the first three with the usual additional assertion there is no evidence to support the conviction; hence, in order to avoid such repetition and duplication, we adopt the four basic causes assigned by the accused for the reversal of his conviction and sentence as succinctly stated in the opinion in State v. Cox, — La. —, 156 So. 2d 448:

> "First, it is asserted that the specific laws under which he was charged, tried and convicted * * * are

---

[3] The 1st was reserved when the trial judge overruled the motion to quash the information; the 2nd when he ruled the state's answer to a request for a Bill of Particulars was adequate; the 3rd is levelled at a purported failure to secure an impartial trial because of the segregated character of the courtroom; and the 4th and 5th, respectively, when the judge overruled motions for a new trial and in arrest of judgment.

unconstitutional in their application, for the conviction thereunder infringes upon the defendant's right of free speech protected by the First Amendment of the United States Constitution which the States cannot deny its citizens because of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

"Second, the claim is made that these laws and the bills of information are too vague and general and hence violate the due process and equal protection clauses of the Fourteenth Amendment.

"Third, it is contended that Cox's trial and conviction were violative of the Fourteenth Amendment for there was no evidence tending to prove the crime charged.

"Fourth, it is contended that the segregated conditions in the courtroom during the trial denied Cox a fair trial in violation of the Sixth and Fourteenth Amendments."

The argument by defense counsel in the case at bar is also almost identical with that presented in the companion cases, both orally and in brief, and, like the Bills of Exceptions, are not only lengthy and repetitious, but, when properly analyzed, as we found in these cases (Nos. 46,395 and 46,396 on the docket of this court), basically unsound in that they are without foundation in fact or in law.

Defendant's first contention is that R. S. 14:401—prohibiting any form of demonstration in or near a building housing a court of the State of Louisiana, or in or near a

(4)
building or residence occupied or used by a judge, juror, witness, or court officer, with the intent of interfering with the administration of justice, or with the intent of influencing such judge, juror, witness, or court officer in the proper discharge of his duties, under which statute the defendant was convicted—is unconstitutional in its application in this case.

While defense counsel concede that interfering with the administration of justice is illegal, as is also the influencing of a judge, juror, witness, or court officer in the proper discharge of his duties, it is contended that if the statute is construed to convict him for demonstrating with his followers in front of the East Baton Rouge Parish courthouse, it is unconstitutional in that it deprives him of his right to peacefully assemble and speak freely, as guaranteed by the First Amendment to the Constitution of the United States; further, that in denying him these rights, it also violates the equal protection and due process clauses of the Fourteenth Amendment to the federal constitution.

In considering similar contentions urged in the two companion cases, we recognized, as did the court below, that under decisions of the Supreme Court of the United States the freedoms guaranteed individuals under the First Amendment are protected by the Fourteenth Amendment from invasion by the states, citing a number of authorities whereby this country's highest court established this rule in the jurisprudence. But we also pointed out that the United States Supreme Court has recognized that the right of freedom of speech and of the press is not absolute, and

held that a state may, by general and non-discriminatory legislation, regulate the exercise of that freedom under its police power. Cantwell v. Connecticut, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213.

Unquestionably these rights, freedoms, or privileges of peaceful assembly and of expression and discussion—however they may be considered—as well as the impartial administration of justice that is guaranteed under the Sixth Amendment to the Constitution of the United States, are all vital and important to the concepts on which this nation was founded. To paraphrase Mr. Justice Frankfurter in (5)
his concurring opinion in Pennekamp v. Florida, the claims with which we are faced are not those of right and wrong, but of two rights, each highly important to the well-being of society, the core of the problem being to arrive at a proper balance between basic conditions of our constitutional republic—freedom of utterance and peaceful assembly on the one hand, and the proper and impartial administration of justice on the other, and since the latter is one of the chief tests of the true concepts of our constitutional government, it should not be made unduly difficult by irresponsible actions.

In his excellent dissertation on the subject matter, which we adopt as based on sound reasoning and unassailable logic, Justice Frankfurter continues: "Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. *The scope and nature of the constitutional protection of freedom of speech must be viewed in that light*

and in that light applied. The independence of the judiciary is no less a means to the end of a free society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective. For *the judiciary cannot function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court.* A judiciary is not independent unless courts of justice are enabled to administer law *by absence of pressure without,* whether exerted through the blandishments of reward *or the menace of disfavor.* * * * A free press is not preferred to an independent judiciary, nor an independent judiciary to a free press. *Neither has primacy over the other;* both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom (whether of utterance, expression, speech, or peaceful assembly) may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press." Pennekamp v. Florida, 66 Sup. Ct. 1029, 328 U. S. 331, 90 L. Ed. 1295. (The emphasis and language within brackets has been supplied.)

(6)

We think it proper to mention here and now that R. S. 14:401 was not, as contended by defense counsel and urged in two of the bills reserved (to the denial of a motion for a new trial and one in arrest of judgment), adopted by the Louisiana legislature "for the specific purpose and intent to implement and further the state's policy of enforced segregation of races." Instead, it was almost a duplicate of an act introduced in Congress in 1949 (Senate Bill No.

1681 and House Bill No. 3766) condemning picketing, parading, and demonstrations in the environs of federal courts, and passed in 1950 with the full support and approval of the American Bar Association for the reason that such conduct in the immediate vicinity of a building or residence housing a court or court officer was anathema to our concepts of justice according to law. The only difference in the federal statute (18 USCA 1507) and our Act No. 177 of 1950 (now R. S. 14:401), as reflected by the wording of our statute as set out in Footnote No. 2, is that in place of the words "in or near a building housing a court of the United States," our legislature substituted the words "in or near a building housing a court of the State of Louisiana."

The legislative history of the federal act on which ours was patterned discloses it was passed because of picketing conducted by large crowds outside of a federal district court building in Los Angeles, but, primarily, as the result of the disgraceful picketing and demonstrations in, around, and near a federal building in New York housing, among other courts, the one in which Judge Harold R. Medina was—for a period in excess of 9 months in 1949—endeavoring to conduct with some semblance of order the trial of 10 of the top leaders of the communist party in the United States, despite the attempt of followers of this philosophy to turn the trial into a travesty of justice by insults, jeers, and harassments through printed signs, calls, loudspeakers, and other methods of persecution heaped upon Judge Medina and court officers in an effort to intimidate the Judge in particular in the proper and impartial trial of that case. *It is significant to note,* however, *that the statute in its*

operation is not limited to any particular group or person. It applies alike to all. And although we can find no other (7)
decision of any court in which the constitutionality of this and like statutes have, heretofore, been assailed, we now hold that R. S. 14:401 is constitutional and was legally enacted under the police power with which this state is endowed to insure the orderly and impartial administration of justice.

The contention that the statute itself, as well as the Bill of Information, are too vague and uncertain to inform the defendant of the nature of the charge against him, as required by Section 10 of Article I of the Constitution of Louisiana; R. S. 15:227; and the Sixth Amendment to the Constitution of the United States, is without merit. As shown above, the mischief sought to be denounced by the statute is as clear as the English language can make it, and since, in drawing the Bill of Information, the district attorney not only tracked the language of the statute itself, but gave such additional facts and circumstances as were necessary to inform the defendant of the nature of the charge against him and also furnish the basis for a plea of former jeopardy, or autrefois acquit, in the event another charge covering this same incident was ever returned against him, it fully complies with all pertinent constitutional and statutory requirements. The Fifth Amendment to the Constitution of the United States; Section 9 of Article I of the Constitution of Louisiana; R. S. 15:274-283; State v. Straughan, 229 La. 1036, 87 So. 2d 523; State v. Scheler, 243 La. 443, 144 So. 2d 389, and the authorities therein cited.

Any additional information thought necessary for the defense of Cox was available to counsel through the means of a Bill of Particulars. However, in resorting to this by motion, counsel only requested that the state advise "whether or not the defendant, in any manner, threatened or intimidated any Judge, witness and/or Court Officer in the discharge of their respective duties, and, if so, give the names and addresses of the Judges, witnesses and/or Court Officers allegedly so threatened or intimiated. Also, state how, when and where the threats and intimidations were made, if any." The second bill was reserved when the trial judge maintained the assertion of the district attorney in his answer that this information was neither relevant nor material for the trial of defendant's case, and in this court (8)
counsel has not shown either orally or in brief (1) in what respect the lower court erred by such ruling, (2) that this information was necessary or relevant under the statute, or (3) that such information was necessary for his defense.

The statute does not make threats or intimidations ingredients or elements of the mischief sought to be prohibited. The sole object is, as previously stated, to make the courts secure from undue interference or harassment by parades, picketing, and demonstrations in or near a building where courts in which the due administration of justice is dispensed are housed, or in or near the residence of officers of such courts.

The contention that there was no evidence tending to prove the criminal charge against the defendant also lacks substance. The jurisdiction of this court in criminal matters

is limited to questions of law alone under Section 10 of Article VII of the Constitution of Louisiana. And although there are decisions of this court recognizing that where there is no evidence at all to support the establishment of an essential element of the crime charged a question of law that we may review is presented (State v. Di Vincenti, 232 La. 13, 93 So. 2d 676; State v. La Borde, 234 La. 28, 99 So. 2d 11; and State v. Bueche, 243 La. 160, 142 So. 2d 381, as well as the authorities therein cited), where there is some evidence to sustain the conviction the sufficiency thereof is a matter that lies within the exclusive province of the trial judge and/or jury, and is not reviewable by this court. State v. Brazzel, 229 La. 1091, 37 So. 2d 609; State v. Domino, 234 La. 950, 102 So. 2d 227; and State v. Copling, 242 La. 199, 135 So. 2d 271, as well as the authorities therein cited.

In our opinion there is ample evidence to sustain the conviction in this case. The record of the testimony (made a part in its entirety by defense motions for a new trial and in arrest of judgment) discloses that according to the estimate of Cox himself between 1,500 and 3,800 colored people congregated in mass formation a couple of blocks
(9)
from the courthouse on December 15, 1961. This was not only the largest mass grouping of any people in that or the downtown Baton Rouge area within the memory of any of the witnesses, but was composed largely of students from Southern University, a state university for colored people located a few miles north of Baton Rouge, that had absented themselves from school on that day in order to par-

ticipate in this demonstration. All were admittedly well trained and indoctrinated and subject to any desired activity required by Cox by so simple a signal as the snapping of his fingers.

This large mass of demonstrators was met by local law enforcement officers, and, when questioned, Cox informed them they were preparing to move on the courthouse in protest against the incarceration (on the fourth floor of that building) of some 23 colored people who had been "illegally" arrested the day previous; whereupon Cox was informed this would avail him and his followers nothing, the proper remedy being to resort to the courts since only there could it be decided whether these people had, indeed, been "illegally" arrested.[4] And despite the fact Cox told the officers he and the demonstrators were going to the courthouse anyway and would there *peacefully* for a few minutes by singing a hymn and patriotic song, praying, and pledging allegiance to the flag, upon arrival across the street from the front of the courthouse, and at a signal from Cox, and demonstrators immediately pulled from beneath their coats theretofore hidden placards and signs with shouts and yells that interspersed the singing and other parts of the purported "program," with the result that, in return, those in the jail answered by yelling, screaming, singing, and banging on the walls and doors of the cells in which they were lodged on that side of the building. Cox added to the situation that had by then reached a high pitch

[4] It does not appear from the record that any attempt whatsoever had been made to secure the release of these 23 persons on bail, or by resort to the available writ of habeas corpus.

of emotional tension by making an "inflammatory" speech, causing some of the officers to feel this now disorderly and seething mob intended to storm the courthouse and liberate the 23 people there incarcerated, and that a riot was inevitable.

(10)

The Sheriff, sensing the seriousness of this explosive situation, by means of a loudspeaker ordered the demonstrators to move on. However, Cox, and on his instruction the group, openly defied this command and continued the "fiery" and "frenzied" demonstration, in which they were still being joined by the 23 people incarcerated in the building, despite a second admonition by the Sheriff. It was only by the use of tear gas that the Sheriff, his deputies, and other law enforcement officers (about 80 in all) were able to disperse the group. The trial judge who presided over these proceedings against Cox—and who, with one or more of the other three judges having chambers in this building in which they had been holding court since early in September, would eventually be required to determine in a proper trial whether the incarcerated people had been "illegally" arrested—stated in his reasons for judgment that he was so "fearful" and "apprehensive" of the outcome of this demonstration by such a large mass of people in the area of the courthouse he was, in fact, intimidated, and, upon learning the demonstration was imminent, closed his office and left the building.

These facts belie defense argument that by his conviction Cox and his followers were denied the right to "peacfully" assemble as guaranteed by the First and Fourteenth Amendments to the federal constitution.

Moreover, while the courts have recognized that picketing is an exercise of a form of free speech that is protected by these constitutional shields, this sweeping analogy as first enunciated by the United States Supreme Court in the case of Thornhill v. State of Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, has since been greatly refined and restricted. For example, this high court in Hughes v. Superior Court of State of California, 339 U. S. 460, 70 S. Ct. 718, 721, 94 L. Ed. 985, pointed out that "* * * *while picketing is a mode of communication it is* inseparably *something more and different * * * 'since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.'* (11)

** * * the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. * * *It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent.* Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. * * * 'a state is not required to tolerate in all places and all circumstances even peaceful picketing * * *.' " In addition, mass picketing is not only reprobated—particularly where it interferes with and hampers others in the orderly discharge of their duties and their right to be where they are in connection with them—but picketing that is not peaceful is prohibited. See the annotation on this subject in 32 ALR 2d 1026, particu-

larly the section No. 6 on page 1036, as well as the supplements thereto. (The emphasis has been supplied.)

From the foregoing it is manifest that the view of the incident as now contended by Cox bears no relation whatever to the established facts disclosing that between 1,500 and 3,800 people marched "en masse" against the halls of justice and acted near such halls in a manner calculated to interfere with the orderly administration of justice. As stated in our decision in the companion cases, "These demonstrators, like other citizens, must confine their exercise of constitutional freedom within lawfully regulated limits of those freedoms." Or, as Judge Learned Hand put it in upholding the conviction of the 10 communist leaders tried before Judge Medina, "Nobody doubts that when the leader of a mob already ripe for riot gives the word to start, his utterance is not protected by the Amendment." See, United States v. Dennis, 183 F. 2d 201.

The final error complained of in this case—that the spectators in the courtroom in which Cox was tried were segregated, thus denying him a fair trial in violation of the Sixth Amendment to the federal constitution, and the equal protection and due process clauses of the Fourteenth—was adjudicated adversely to the defendant in our decision in the companion cases.

Counsel do not claim that Cox did not receive a fair and
(12)
impartial trial in accordance with the accepted rules and regulations fixed for the orderly trial of cases in the courts of this state, as required by our constitution and statutes, or point out in what manner he was prejudiced by the separation of the spectators in the courtroom where he was tried.

Instead, it is contended that the constitutional rights of "these spectators" were violated during the process of his trial, and it is his right to assert the denial of the rights of these people thus purportedly occurring.

One need only review the record in this case to readily discern the defendant received a fair and impartial trial, being given every consideration and protection afforded all persons accused of crimes under our constitutional and laws by a judge who acted throughout with great patience and forebearance in an effort to maintain a reasonable semblance of order in the courtroom during the trial, as well as to accommodate the colored spectators, even authorizing the use by them of all seats not then occupied by the white people. Finally, on the third day of the trial, he went so far as to have an officer of the court count the number of seats still vacant and then go into the corridors outside the courtroom and inform those congregated there of their availability. Nevertheless, the trial continued with many still remaining vacant.

To hold, as contended by Cox, that his conviction is a nullity merely because of the segregated condition of the courtroom, would, of necessity, make every conviction of an accused during the past years in all of the courts of the state, and regardless of race, nullities, with the result that everyone now confined in our penal institutions would be entitled to have his conviction set aside, and these thousands of criminals would then be turned loose on the people of the state.

For the reasons assigned, the conviction and sentence are affirmed.

(22)

Notice of Motion to Quash

To the Honorable, the Judges of the Nineteenth Judicial District Court, in and for the Parish of East Baton Rouge, State of Louisiana:

AND NOW into this Honorable Court, through his undersigned counsels, comes B. Elton Cox, the defendant in the above entitled and numbered cause, moves to quash the Bill of Information for the following reasons, to-wit:

1.

That the defendant alleges and avers that he did on December 15, 1961, in protest of racial segregation, engage in a demonstration by assembling on the West side of St. Louis Street, across the street from the Courthouse Building of East Baton Rouge Parish, State of Louisiana, but denies that he engaged in any activity whatsoever with the intent of violating LSA-R. S. 14:401 as charged in the Bill of Information.

(23)

2.

That LSA-R. S. 14:401 is sufficiently vague and indefinite to be unconstitutional on its face, in that, it does not prescribe the distance or a limit from the Courthouse Building where the defendant or any other citizen of the United States of America can lawfully assemble in exercise of the rights accorded the defendant, or any other citizen of the United States of America, by the First Amendment to the Constitution of the United States of America.

Notice of Motion to Quash

3.

That LSA-R. S. 14:401 is so vague and indefinite in its construction so as to deprive defendant of his rights, privileges, immunities and/or liberties without due process of law and denies him the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

4.

That the said Bill of Information does not allege any unlawful act or acts committed by the defendant, except violating the rights of freedom of speech, press, assembly and petition accorded the defendant, a citizen of the United States, by the First Amendment to the Constitution of the United States of America.

5.

That while the arrest and charge were for demonstrating with the intent to interfere with, obstruct and impede the administration of justice, and with the intent of influencing a Judge, witnesses and Court Officers, in the discharge of their duties, there was no such activity or activities, except the activity or activities in which the defendant engaged to protest racial segregation, and that the use of the criminal process in such a situation denies and deprives the defendant, a citizen of the United States, of his rights, privileges immunities and liberties guaranteed defendant by the Fourteenth Amendment to the Constitution of the United States of America.

6.

That if said Statute LSA-R. S. 14:401, as amended, does

engaging in a demonstration in protest of racial segregation interferes with, obstructs, impedes the administration of justice, and influences Judges, witnesses and Court officers in the discharge of their duties, then and in that event said Statute, LSA-R. S. 14:401, is unconstitutional in that it deprives your defendant of his rights, privileges, immunities and/or liberties without due process of law and denies him the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

7.

That the Bill of Information is insufficient to charge an offense or crime under LSA-R. S. 14:401, except violating the rights, privileges, immunities and liberties accorded and guaranteed the defendant, a citizen of the United States, by and under the First and Fourteenth Amendments to the Constitution of the United States of America.

WHEREFORE, your defendant, B. Elton Cox, prays that this Motion to Quash be maintained and that the said Bill of Information as to him, and as far as he is concerned be declared null and void and that he be discharged therefrom.

Attorneys for Defendant:

JOHNNIE A. JONES
ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 Dryades Street
New Orleans 13, Louisiana

/s/ By: Johnnie A. Jones

Opinion on Motion to Quash

(26)

That on a subsequent day of Court a hearing was had contradictorily with the state on said motion to Quash and that the court overruled and denied the said motion to Quash to which your defendant then and there objected and reserved a bill of exceptions to the information, the motion to Quash, the States answer to the motion to quash and to the Courts ruling denying the said Motion to Quash, and now your defendant perfects this formal bill of exceptions making a part of same the said information, the motion to Quash, the States answer to the motion to Quash, any evidence offered or testimony heard on the motion to Quash, the Courts ruling on same, and the entire record in these proceedings, and first submitting this his formal bill of exceptions to the District Attorney, now tenders the same to the court

and prays that the same be signed and sealed by the judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly this *31st* day of *January* 1963.

(Signed) Fred A. Blanche, Jr.
JUDGE

Notice of Motion in Arrest of Judgment

(13)

Now into Court, after verdict against B. Elton Cox, and before sentence comes the said B. Elton Cox, through undersigned counsel, and moves the Court here to Arrest Judgment herein and not to pronounce the same because of manifest errors in the record appearing to-wit:

1.

That at the beginning of the trial (Transcript Page 4) attorney Johnny Jones moved for the record to show that Murphy Bell, Attorney, was associated on the case with him. That the court ordered a minute entry to that effect. That Attorney Jones also asked for the same record to show that the courtroom was segregated to which request the District Attorney objected and to which the court replied:

> "*Also let the record show* that it has been the practice and custom in the East Baton Rouge Parish Courthouse for many, many years, and in the purpose of maintaining order in the courtroom, separate portions are placed in the courtroom for both colored and white and *let the record* especially show that the

(14)

> judge in this case ordered that half of the seats that were formerly reserved and available for white people are now being occupied and filled by colored people". (italics ours)

That on Wednesday, January 31, 1962 (transcript page 278) Johnny Jones renewed his objection to the segregated courtroom, in the following words:

Notice of Motion in Arrest of Judgment

> "Your Honor, I want to renew our objection about court being segregated and I want to reserve a formal bill".

To which the court replied:

> "Well, I just don't think it makes any difference I don't know if he has got any right to a bill on it or not, but I will let him perfect on it, if he wants to".

Then after some discourse between Mr. Pitcher and Mr. Jones the court said:

> "Let it stand as it is".

The above statements are held by counsel to constitute a correct reserving of an objection and reserving of a Bill of Exceptions to the overruling of the Motion to Desegregate the Courtroom. If not so deemed, then it is our alternative position that the remarks of the court constitutes a part of the record which may properly be presented in review for error in a Motion in Arrest of Judgment.

Thus the record shows on its face that defendant was deprived of rights guaranteed him under the equal protection of the laws and due process of law clauses of the Fourteenth Amendment to the Constitution of the United States.

2.

That the Bills of Information are insufficient to charge a crime under L. S. A.-R. S. 14:401.
(15)

3.

That the convictions of defendant for violation of L. S. A.-R. S. 14:401 denied defendant rights guaranteed to

him under the first amendment to the Constitution of the United States.

4.

That the convictions of defendant for violation of L. S. A.-R. S. 14:401 denied defendant rights guaranteed to him under the Sixth Amendment to the Constitution of the United States.

5.

That the statute under which the defendant was convicted is unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United States in that it was enacted for the specific purpose and intent to implement and further the state's policy of enforced segregation of races.

6.

That the statute under which the defendant was convicted is unconstitutional and in contravention of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States in that they were arbitrarily, capriciously and discriminately enforced against persons peacefully exercising their rights of freedom of speech in protest against racial segregation.

7.

That the statute under which defendant is convicted and the Bill of Information filed thereunder is unconstitutional for want of adequate notice, vagueness and uncertainty therefore said statute could not constitutionally be con-

strued to cover the activities sought to be punished by the Louisiana Courts.

8.

That the judgment is contrary to the law and the evidence in that there is no evidence to support a finding of guilt under said statute thus violating defendant's rights (16)
under the Due Process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States of America.

WHEREFORE, your mover prays that, a rule nisi issue out of this Honorable Court directed to Honorable Sargent Pitcher, Jr., District Attorney ordering him to show cause, if any he has, why a Motion in Arrest of Judgment should not be granted in these proceedings.

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 Dryades Street
New Orleans 13, Louisiana

(Signed) By: Nils R. Douglas
MURPHY W. BELL
971 South 13th Street
Baton Rouge, Louisiana

Of Counsel:

CARL RACHLIN, ESQ.
280 Broadway
New York, New York

Opinion on Motion in Arrest of Judgment

(37)

The Court, after due consideration of the Motion in Arrest of Judgment filed and submitted by counsel for accused, denied and overruled same. To which ruling of the Court, counsel for accused excepted and reserved a formal bill of exceptions, making a part of the bill, the entire record of these proceedings and the motion filed. Defendant first submitting this his bill of exceptions to the District Attorney now tenders the same to the Court and prays that the same be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly this *31st* day of *January* 19*63*.

(Signed) Fred A. Blanche, Jr.
JUDGE

Notice of Motion for New Trial

(18)

NOW INTO COURT, through undersigned counsel comes B. Elton Cox, the defendant in the above entitled and numbered cause and moves the court that the verdict rendered herein be set aside and a New Trial ordered, for the following reasons:

—1—

That the Bill of Information is insufficient to charge a crime under L. S. A.-R. S. 14:401.

—2—

That the conviction of defendant for violation of L. S. A.-R. S. 14:401 denied defendant rights guaranteed to him under the First amendment to the Constitution of the United States.

—3—

That the conviction of defendant for violation of L. S. A.-R. S. 14:401 denied defendant rights guaranteed to him under the Sixth Amendment to the Constitution of the United States.

—4—

That the courts overruling of defendant's objection to the segregated seating in the courtroom to which ruling defendant reserved a formal bill of Exceptions was error and prejudicial to the defendant in that it denied him the right to a fair trial guaranteed to him by Article I Section 6 of the Constitution of the State of Louisiana. Said error further denied defendant the equal protection of the laws and due process of law guaranteed to him by the First Section

(19)
of the Fourteenth Amendment to the Constitution of the United States.

—5—

That the statute under which the defendant was convicted is unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United States in that it was enacted for the specific purpose and intent to implement and further the states policy of enforced segregation of races.

—6—

That the statute under which the defendant was convicted is unconstitutional and in contravention of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States in that it was arbitrarily, capriciously and discriminately enforced against persons peacefully, exercising their rights of freedom of speech in protest against racial segregation.

—7—

That the statute under which defendant is convicted and the Bill of Information filed thereunder are unconstitutional for want of adequate notice, vagueness and uncertainty therefore said statute could not constitutionally be construed to cover the activities sought to be punished by the Louisiana Courts.

—8—

That the judgment is contrary to the law and the evidence in that there is no evidence to support a finding of guilt

under said statute thus violating defendant's rights under the Due Process Clause of the Fourteenth Amendment.

—9—

That the Court erred to the prejudice of the accused by denying the Motion to Quash.

—10—

That the Court erred to the prejudice of the accused by denying the Application for a Bill of Particulars.

(20)

WHEREFORE, your mover prays that, a rule nisi issue out of this Honorable Court directed to Honorable Sargent Pitcher, Jr., District Attorney ordering him to show cause; if any he has, why a New Trial should not be granted in these proceedings.

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS R. ELIE

(Signed) By: Nils R. Douglas
MURPHY W. BELL
971 South 13th Street
Baton Rouge, Louisiana

Of Counsel:

CARL RACHLIN
New York, New York

Notice of Motion for New Trial

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority personally came and appeared:

NILS R. DOUGLAS

who after first being duly sworn did depose and say that he is the attorney in the above matter and all the allegations herein contained are true and correct.

(Signed) Nils R. Douglas
NILS R. DOUGLAS

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 29 DAY
OF JANURY, 1963.

(Signed) Murphy W. Bell
NOTARY PUBLIC

(31)

Opinion on Motion for New Trial

The Court, after hearing the said Motion of the defendant for a New Trial, denied and overruled the same, and to such action of the court, counsel for the defendant then and there objected and reserved a formal bill of exceptions and counsel now perfects this his formal bill of exceptions to the overruling of the Motion for a New Trial and makes a part hereof the bill of information, the motion to quash, the Courts ruling overruling the motion to quash and any evidence offered or testimony heard on the trial of the case on the merits, the motion for a New Trial, the courts ruling on the motion for a New Trial and the entire record in these proceedings, and first submitting this his bill of exceptions to the District Attorney now tenders the same to the Court and prays that the same be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly this 31st day of January 1963.

(Signed) Fred A. Blanche, Jr.
JUDGE

(4)

Excerpts From Transcript of Trial

Mr. Jones: Your Honor, I would like to move to associate attorney Murphy Bell on the case with me.

The Court: All right.

Mr. Jones: I would like for the record to show that he is now being associated on the case.

The Court: Show a minute entry to that effect.

Mr. Pitcher: No objection.

Mr. Jones: I would also like for the record to show that

(5)

this case is one where the defendant is being charged for the protest of racial segregation and that within the Courthouse itself that the defendant is being tried in that racial segregation is being practiced and that there are interested parties, citizens on the outside of court waiting—

Mr. Pitcher: I object to the remarks of counsel—

Mr. Jones: —who are interested in the case and that there are seats vacant in the court which are being reserved for the whites and that the Negro citizens who are interested in the case and the outcome of the case are not permitted to utilize these seats. I would like for that to be made a part of the record.

The Court: Also, let the record show that it has been the practice and custom in the East Baton Rouge Parish

(6)

Courthouse for many, many years, and in the purpose of maintaining order in the courtroom, separate portions are placed in the courtroom for both colored and white, and let the record especially show that the judge in this case ordered that half of the seats that were formerly reserved

and available for white people are now being occupied and filled by colored people.

Mr. Pitcher: If Your Honor Please, while Your Honor is well aware of what is going on, I am sure that the Supreme Court of the United States will not be, and for that reason, I ask that Your Honor appoint a Deputy Sheriff to personally count the number of people in this room to be able to testify as to the number of people present in (7)
court and the seats available and the number of white people present. I think the State is entitled to that.

The Court: All right.

(A Deputy Sheriff was so appointed by the Court at this time and ordered to count the people in the courtroom while the proceedings were going on.)

Mr. Jones: If the count is to be made, Your Honor, we would also like to make a count of those who are waiting on the outside.

The Court: Count them, too.

Mr. Jones: And count the number of seats that are still available.

The Court: All right.

Excerpts From Transcript of Trial

(340)

Testimony of Thomas Terrell Edwards, Captain in Charge of Jail, and Herman Thompson

By the Court:

Q. In response to a request of the Court did you count the number of colored people sitting in the courtroom at the time court opened on, what day was that—Monday? A. Day before yesterday.

Mr. Jones: Monday, the twenty-ninth.

Q. Did you do that? A. Yes, sir, I did.

Q. And how many people were sitting in here? A. There was 127 colored and 8 whites in the courtroom behind the rail.

Q. Behind the rail. A. At the first count I made. Now, I made two, If Your Honor remembers. The second count there was the same number of colored, 127, and there were 14 whites.

Q. How much later was that? A. Oh, about two hours, if I recall correctly.

Q. When court opened there were 127 colored and 8

(341)

whites, is that correct? A. Yes, sir.

Q. And approximately how many seats were reserved by the Court for whites? A. Forty-two.

Q. How many colored were on the outside? A. Eighty-eight.

Q. Eighty-eight? A. Yes, sir.

Excerpts From Transcript of Trial

By Mr. Jones:

Q. Would they be waiting to get in, sir? A. None of them indicated that they wanted to get in. They were standing in the hall is all I could tell.

By the Court:

Q. Was that at the same time, because it looked like to me that there were more than eighty-eight. A. At the time I counted, sir, there were just eighty-eight. Now, I was told—

Q. How much later was that than when I first told you—when we opened Court, how much longer after that did you go out and count? A. Well, I made the second count in the courtroom and then I went outside and made a count, and I believe it was approximately two hours between the two counts. I am guessing at that time. At the time I really don't recall, sir.

(342)

Q. At the time that the court was opened, wasn't there more out there in the hall than there were at the time you took the count? A. I don't know, sir.

Q. I was told there were. A. I was told that at several times in the afternoon there 200 or 250, but I didn't see them. I didn't go out there.

Q. Do you know anyone who could make an estimate to that effect among the officers? A. Captain Henderson or Captain Thompson could.

The Court: All right, is that all?

Excerpts From Transcript of Trial

By Mr. Jones:

Q. Did you reserve any seats in the courtroom for the white people? A. I didn't reserve any seats for anyone.

Q. Was there any seats in the courtroom reserved for the whites then? A. No, sir, His Honor—

The Court: I will answer that from the bench. I reserved one-half of what was formerly the white

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section for white people and I gave the other half of it to the colored people.

WITNESS EXCUSED

The Court: Captain Thompson.

HERMAN A. THOMPSON, called as a witness by the Court, being first duly sworn, testified as follows:

Direct examination by the Court:

Q. How many colored people were out in the hall at the time court started on Monday? A. There were two hundred or better, Judge.

Q. Is that your estimate? A. Yes, sir, that was why we called the fire marshals.

Q. Could it have been as many as 250? A. It could very easily.

Q. Could it have been more than 250? A. They were solid from this courtroom door about four foot out from the door down to the Grand Jury room, and there were some of them sitting on benches down the hall.

Excerpts From Transcript of Trial

Q. Did you clear a corridor between them for a passage-
(344)
way to the door here? A. We were having difficulty. That is why we called the fire marshals in order to enforce the fire laws.

Q. How long did a crowd of that size remain outside? A. I would say for at least two hours.

By Mr. Pitcher:

Q. Captain, at the time there were 250 people in the hall, was that the same time that Captain Edwards has said there were 127 in the courtroom? A. That is correct, sir.

Q. And there were only eight white people in it at that time? A. That is correct, sir.

Mr. Pitcher: That's all. Your witness.

A. (Directed to the Court) Do you want what you asked for yesterday?

By the Court:

Q. What is that? A. You asked how many vacant seats there were.

Q. What time was it? A. At 11:15 A. M. yesterday you asked me and there were twenty vacant seats and only five waiting outside, and out of the five we asked—one was Reverend Johnson and he said he didn't care to come in.

In the Supreme Court of the United States
October Term, 1963
No. _____
B. Elton Cox. Appellant, against State of Louisiana, Appellee
On Appeal from the Supreme Court of Louisiana
JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Louisiana entered in the above-entitled case on November 12, 1963, ~~which affirmed~~ affirming a conviction for illegally demonstrating near a courthouse rendered by the District Court for the 19th Judicial District, Parish of East Baton Rouge, Louisiana (hereinafter referred to as the "District Court").

CITATIONS TO OPINIONS BELOW

The oral opinion of the judge of the District Court given at the end of the trial of this case is unreported and is printed in the Appendix at p. . The opinion of the Supreme Court of Louisiana affirming the judgment of the District Court on appeal, reported in _____ La. ____, is

printed in the Appendix at p. .*

JURISDICTION

Appellant was convicted under a Louisiana statute, L.S.A.-R.S. 14:401, prohibiting demonstrations in or near a courthouse of the State of Louisiana, with the intent of obstructing or impeding interfering with the administration of justice or of influencing a juror judge, ~~juror~~, witness or court officer in the proper discharge of his duties, which is set out in the Appendix at p. . The judgement of the Supreme Court of Louisiana affirming the conviction was entered on November 12, 1963, and rehearing was denied by that court on December 20, 1963. The jurisdiction of this court to review the judgment

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* The Rev. Mr. Cox was convicted on two other counts, for obstructing the sidewalk and breach of the peace at the same trial in the District Court. These convictions were reviewed by the Supreme Court of Louisiana on supervisory writs of mandamus certiorari and prohibition, pursuant to Article VII, Section 10, of the Louisiana Constitution. The convictions were affirmed, ___ La. ___, 156 So.2d 448 (1963), and a jurisdictional statement for appeal was filed in this Court on January , 1964.

by appeal in this case is conferred by Title 28 of the United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the decision on appeal in this case: Cantwell v. Connecticut, 310 U.S. 296 (1940); Winters v. New York, 333 U.S. 507 (1948); Herndon v. Lowry, 301 U.S. 242 (1937).

QUESTIONS PRESENTED

Whether the Louisiana statute regarding parades in or near a courthouse, L.S.A.-R.S. 14:401, by reason of its vagueness and uncertainty, is repugnant to the due process clause of the Fourteenth Amendment to the Constitution.

Whether the Louisiana statute regarding parades in or near a courthouse, L.S.A.-R.S. 14:401, as interpreted and applied to appellant, is repugnant to the due process clause by the ~~Supreme Court~~ courts of Louisiana of the Fourteenth Amendment to the Constitution, because it infringes his right of free speech and free assembly, and to petition for redress

of grievances.

Whether the discriminatory application of the Louisiana statute regarding parades in or near a courthouse ___ L.S.A.-R.S. 14:401, has denied appellant the equal protection of the laws under the Fourteenth Amendment to the Constitution.

Whether appellant was denied equal protection of the laws and due process of law under the Fourteenth Amendment to the Constitution by being tried in a court room that was segregated due to state action.

STATUTES INVOLVED

The statutory provision involved is Louisiana Statutes Annotated, R.S. 14:401. It is printed in the Appendix at p. .

STATEMENT

On December 14, 1961, twenty-three youngsters who were

picketing stores in the downtown area of Baton Rouge, Louisiana, in protest against segregation and discrimination against Negroes, were arrested (T. 348, 400, 458)* and were incarcerated in the jail adjacent to the District Courthouse in Baton Rouge (T. 348, 466). Shortly before noon, the following day, students from a nearby Negro college, Southern University, began to gather about the old Capitol Building in Baton Rouge (T. 251, 437, 510-512). None of the twenty-three arrested the previous day was being tried or arraigned at that time (T. 201-203, 346-347). About noon the students

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* The transcript of the trial in the District Court, though made by a court stenographer, is not physically part of the record before the Louisiana Supreme Court. To supplement the record, referred to herein by the symbol "R-", the transcript of trial ~~is submitted with this petition~~ which was submitted to this Court in a companion case, Cox v. Louisiana, No. —, and referred to by the symbol "T-".

** While the immediate facts of this case are as stated here, the events were part of a continuous course of conduct in Baton Rouge on December 15, 1961. Petitions for certiorari have been ~~filed with~~ denied by this Court in two other cases arising out of these events. Moore v. Louisiana (conviction for use of a sound truck) and Clemmons v. CORE, where the Court of Appeals for the Fifth Circuit vacated an injunction against CORE granted by the U.S. District Court in Baton Rouge, La., 323 F.2d 54 (5 Cir. 1963).

marched down to the Courthouse under the leadership of the appellant, the Rev. B. Elton Cox, a field secretary for the Congress of Racial Equality (T. 468, 513). Mr. Cox conferred with the Sheriff, the Chief of Police and other law-enforcement officers, and explained to them that the students intended to demonstrate in protest against segregation and discrimination in the stores and against the arrest of the pickets. He further presented a program for the demonstration (T. 351, 371, 470, 515). The Sheriff stated on cross-examination that he had "no objection" to the demonstration under that program (T. 363-364). The Chief of Police allowed seven minutes for the demonstration (T. 101, 516-517), and limited it to the West side of the street, opposite the Courthouse (T. 371, 516).

The students, more than fifteen hundred of them (T. 51, 71, 269, 313), assembled on the sidewalk on the West side of the street. A ~~curious~~ curious group of white people gathered on the opposite side of the street (T. 20, 28, 167). More

than seventy-five policemen and sheriff's deputies were present, who, according to the inspector who was in charge of the policemen, "could handle any situation that should arise" (T. 329). No violence of any kind occurred during the demonstration; on the contrary, all testimony proved that the Rev. Mr. Cox maintained control of the students at all times (T. 38, 107, 257, 318, 355). In accordance with the program described to the Sheriff the students pledged allegiance to the flag of the United States, recited the Lord's Prayer, exhibited signs protesting segregation and sang freedom songs. In response the students in the jail (the same ones who had been arrested the previous day) began to sing (T. 467), and upon hearing the prisoners, ~~sing~~, the demonstrators uttered a cheer (T. 54, 60, 353). Mr. Cox made a speech (T. 42, 235, 255, 325, 516-518) which not only contained nothing of violence in it (T. 29, 44, 158, 268, 302), but in fact directly forbade violence (T. 37, 299, 363). Mr. Cox advised that if any of the demonstrators should be

attacked, he was not to retaliate. According to Cox's own testimony, with which other witnesses were in agreement (T. 29, 37, 53, 105, 153, 196, 272-3), he said at the close of his speech:

> "* * * all right. It's lunch time. Let's go eat. There are twelve stores we are protesting. A number of these stores have twenty counters, they accept your money from nineteen. They won't accept it from the twentieth counter. This is an act of racial discrimination. These stores are open to the public. You are members of the public. We pay taxes to the Federal Government and you who live here pay taxes to the state." (T. 518)

That was the sticking-point for the Chief of Police and the Sheriff (T. 364, 376), who then commanded the demonstrators to break up the demonstration. Tear gas was released into the ~~crowd, which~~ then broke up immediately (T. 377).

group/students, which was still orderly, and at

Mr. Cox was arrested and charged with criminal conspiracy, breach of the peace, obstructing the sidewalk, and demonstrating in front of a courthouse with the intent of/obstructing ~~justice~~. The trial took place in the District Court at Baton Rouge, the very building before which the demonstrators

interfering with and impeding the administration of, or of influencing a judge, witness or court officer

without a jury on January 29 through 31, 1962,

now, what do people do when they come and parade in

front of the Courthouse? I was not a witness to the demonstration myself personally, but I was present in the Courthouse shortly before it occurred. I was present in this Courthouse when evidently the police had gotten notice that some demonstration was impending, and my reaction was to get away from it as fast as I could. If you asked me what I was afraid of, I can tell you best by saying that having lived here in the South all of my life and being present around a demonstration of some 1,500 colored people who are protesting against racial discrimination and being a part of this community and living in this community where I know that especially of late that there is tension between the races, I felt that it would be unpleasant in some way or it would be some unpleasant thing to me to see; and because I know that there is tension between the races, I think I felt apprehensive that trouble or violence could erupt from such a situation. That is what I felt in my heart and that is why I left, because I didn't want to be anywhere near or in connection with it. I can say that it had influence on me. I can say that it made me fearful. Perhaps a better word would be "apprehensive," that there might be some racial violence. I can say as a judge that that is the way I felt. With all my heart I can say that. Then when I try to think of, if you want to protest, why protest around the Courthouse, I get the feeling that there is some subtle intimidation of me or of anyone of us who is

responsible for upholding the laws of the State of Louisiana and maintaining, according to certain of our laws, segregation.

had gathered, ~~on January 29 through 31, 1962, without a~~ jury. The criminal conspiracy charge was dismissed, but Cox was convicted on the other three counts. In the course of his opinion in regard to obstructing justice by demonstrating in or near a courthouse, the judge said

(Here take in part of opinion)
(T 547-49; Appendix at pp.)

For obstructing justice, Cox was sentenced* to serve one year in jail and pay a fine of $5,000.00, or in default thereof to serve one year additional. The obstructing justice charge was reviewed in the Louisiana Supreme Court by way of appeal, and the conviction was affirmed. It is this conviction of which review is sought in this court.**

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* The Supreme Court of Louisiana reviewed the sentencing procedure in this case, and found it to be invalid. State v. Cox, 243 La. 917, 148 So.2d 600 (1962). The appellant was subsequently resentenced.

** For breach of the peace and obstructing the sidewalks, Cox was sentenced to serve a total of nine months in jail, and pay a fine of $700.00, or in default thereof to serve nine months additional. The Supreme Court of Louisiana reviewed the convictions by way of application for writs of mandamus certiorari and prohibition, and the convictions were affirmed, State v. Cox, ___ La. ___, 156 So.2d 448 (1963), and a notice of appeal to this court has been filed.

The validity of the statute here involved, L.S.A.-R.S. 14:401, was called into question because of its repugnancy to the Constitution of the United States, and other questions were raised in the District Court by a motion to quash (R. 22), a motion in arrest of judgment (R. 13) and a motion for a new trial (R. 18). Each of these motions was denied, and together with the opinions of the District Court (R. 26, 31), they appear in the Appendix at pp. ~~27a, 31a, 36a~~. In appellant's appeal to the Louisiana Supreme Court from the conviction of obstructing justice, the validity of the statute was again questioned on the ground of repugnancy to the Constitution of the United States. The decision of the Louisiana Supreme Court was in favor of the validity of the statute.

The record is clear that the courtroom was segregated by order of the District Court judge. The judge took judicial notice of this fact, stating:

> "The Court: Also, let the record show that it has been the practice and custom in the East Baton Rouge Parish Courthouse for many, many years, and in the purpose of maintaining order in the courtroom, separate portions are placed in courtroom for both colored and white, and let the record especially show that the judge in this case ordered that half of the seats that were formerly reserved and available for white people are now being occupied and filled by colored people." (T. 5-6, Appendix at pp. 40a-41a)

The Deputy Sheriff in charge of the jail and a second deputy testified as to the composition of the courtroom, the numbers of empty seats reserved for whites, and the number of colored people waiting in the corridors of the courtroom (T. 340-345). These passages in the record appear in the Appendix at pp. ~~42a-43a~~. The question of the fairness of the trial was also

raised in the motions in the District Court and in the application to the Louisiana Supreme Court.

THE QUESTIONS ARE SUBSTANTIAL

1. Unconstitutionality of Statute

The non-violent demonstration which occurred in this case across the street from the District Courthouse in Baton Rouge is, like other peaceful forms of expression, part of the "free trade in ideas" which is protected by the guarantee in the First Amendment of freedom of speech and of assembly. Edwards v. South Carolina, 372 U.S. 229 (1963). A statute which may affect an area of protected expression must be "* * * narrowly drawn so as to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State * * *" Cantwell v. Connecticut, 310 U.S. 296, 311 (1940). This standard is not altered by the simple fact that the demonstration in this case took place across the street from a courthouse and partly in

protest against an arrest of prisoners incarcerated in a jail attached to the courthouse. This Court has many times dealt with the constitutional problem presented in this case, that of reconciling the right of the courts to be free of intimidation with the right of freedom of expression "* * * in the broadest scope compatible with the supremacy of order * * *." Pennekamp v. Florida, 328 U.S. 331, 334 (1946). While the present case, that of criminal sanctions for a protest against an arrest, has not been presented to this Court, the same constitutional question has been presented in the cases concerning the sanction of contempt for protest against actions taken by courts in cases pending before them. In a long line of cases, this Court has held that the standard to be applied in determining whether an expression of opinion upon a pending case may be punished by the state is whether that expression presents a clear and present danger to the administration of justice. Woods v. Georgia, 370 U.S. 375 (1962);

Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941). The standard applicable in such cases was clearly stated in Craig v. Harney, supra, and was reaffirmed in Wood's v. Georgia, supra:

> "The fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." 331 U.S. at 376, 370 U.S. at 385.

The Louisiana statute prohibiting demonstrations interfering with, in or near a courthouse "with the intent of obstructing or impeding the administration of justice, or with the intent of influencing any judge, juror witness or court officer, in the discharge of his duty" is unconstitutional on its face under the rigorous standard of clear and present danger established by this Court in cases involving protests directed at the administration of justice. Each of the publications found by this Court to be protected under the First Amendment in the ~~contempt~~ cases of contempt by publication, see, e.g., Pennekamp v. Florida, 332 U.S.

331, 346 (1946), was intended as a protest against some aspect of the administration of justice in the hope of affecting that administration, whether directly or indirectly. The phrase "with the intent of influencing any judge, witness or court officer in the discharge of his duty" would cover those cases of contempt. On its face, therefore, the phrase includes forms of expression which are protected by the First Amendment and it is an infringement of the freedom of speech. Winters v. New York, 333 U.S 507 (1948).

This infirmity in the language of the statute the courts of Louisiana might perhaps have cured, see Winters v. New York, ~~333 U.S. 507 (1948)~~ supra, either by limiting the application of the statute as a whole to situations which present a clear and present danger to the administration of justice, or by limiting the meaning of the "intent" necessary to this statute to such situations. Cf. American Communications Association v. Douds, 337 U.S. 382, 407-408 (1950).

The courts of Louisiana failed to take either course. In considering the statute as a whole, the judge of the District Court said that he ~~felt~~ the demonstration was "* * * some subtle intimidation of me or of anyone of us who is responsible for upholding the laws of the State of Louisiana * * *" (Appendix at p.). He did not consider whether the protest presented a clear and present danger to the administration of justice, nor whether it could possibly have presented such a danger, at a time when the prisoners were not being arraigned or tried before his court. In affirming the decision of the District Court, the Louisiana Supreme Court ~~also~~ failed to apply a constitutionally acceptable standard. It held only that the state has a legitimate right under its police power to protect the impartial administration of justice, without recognizing that the police power is limited in such cases to averting clear and present danger to the administration of justice. In this connection, the Louisiana

Court said:

> "In considering similar contentions urged in the two companion cases, we recognize as did the court below, that under decisions of the Supreme Court of the United States the freedoms guaranteed individuals under the First Amendment are protected by the Amendment from invasion by the states, citing a number of authorities whereby this country's highest court established this rule in the jurisprudence. But we also pointed out that the United States Supreme Court has recognized that the right of freedom of speech and the press is not absolute and held that a state may, by general and nondiscriminatory legislation, regulate the exercise of that freedom under its police power. Cantwell v. Connecticut, 310 U.S. 296.
>
> "Undoubtedly these rights, freedoms or privileges of peaceful assembly and of expression and discussion - however they may be considered - as well as the impartial administration and justice that is guaranteed under the Sixth Amendment to the Constitution of the United States, are all vital and important to the concepts on which this nation was founded. To paraphrase Mr. Justice Frankfurter in his concurring opinion in Pennekamp v. Florida, the claims with which we are faced are not those of right and wrong, but of two rights, each highly important to the well being of society, the core of the problem being to arrive at a proper balance between basic conditions of our constitutional republic - freedom of utterance and peaceful assembly on the one hand, and the proper and impartial administration of justice on the other, and since the latter is one of the chief tests of the true concepts of our constitutional government, it should not be made unduly difficult by irresponsible actions." ___ La. at ___, Appendix at p. .

OBVIOUSLY THIS IS IN CONTRADICTION WITH THE NOTION THAT TO REGULATE FREE SPEECH THE STATUTE SHOULD BE NARROW NOT "GENERAL"

This consturction of the statute, like that of the District Court, is so broad as to draw within its scope protected forms of speech, because it fails to limit the effect of the statute to cases which present a clear and present danger to the administration of justice.

In defining intent in the clause: "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness or court officer in the discharge of his duty" (emphasis supplied), the Louisiana courts again ran afoul of standards set forth in the decisions of this Court. The meaning of this phrase could have been narrowed so as to include only situations in which the accused, by unmistakable acts, shows his intention to affect the outcome of a case or otherwise interfere with the administration of justice. See Yates v. United States, 354 U.S. 298, 318 (1957)(narrow construction of the meaning of "teaching and advocacy" under the Smith Act

so as to cover situations of clear and present danger);

Winters v. New York, 333 U.S. 507 (1948). The decisions of the Louisiana courts exclude such a narrow interpretation, however. ~~Both the District Court and the Louisiana Supreme Court found that there was an intent on the part of the appellant to obstruct justice or influence an officer of the court (Appendix pp.), despite the fact that~~ the prisoners whose incarceration was being protested were not on trial, ~~that~~ their trial was not immediately in prospect (T. 201-203), ~~and that~~ all the witnesses both for the prosecution and the defense agreed that the purpose of the protest demonstration was peaceful (T. 29, 37, 44, 158, 268, 299, 302, 363). Both courts in effect found that any demonstration near a courthouse in protest against an arrest, regardless whether the trial of the person arrested is in progress or even imminent, is enough to make out the necessary intent. This ruling utterly fails to restrict the meaning of intent to obstruct justice.

or influence a court officer to situations which present a clear and present danger to the administration of justice. The vague definition of intent applied by the Louisiana courts acts as an unconstitutional restraint of freedom of speech. Pennekamp v. Florida, 328 U.S. 331, 347 (1946).

The construction by the District Court and the Louisiana Supreme Court of the statute as a whole, and of the clause regarding intent in particular, is so general, in the end, as to render the statute too vague and indefinite to give fair notice of what acts may be punished under the statute. It is plain that the statute cannot punish speech which is protected by the First Amendment. It is therefore impossible under the interpretations of the District Court and the Louisiana Supreme Court for any person to ascertain what conduct is prohibited by the statute. Winters v. New York, 333 U.S. 507 (1948); Herndon v. Lowry, 301 U.S. 242, 261 (1937).

The only evidence of a danger to the administration of justice or of intent to obstruct justice or influence an officer of the court presented against the Rev. Mr. Cox was the simple fact that he had led a protest, in a manner prescribed by the police, across the street from a courthouse, in protest against the arrest of ~~perse~~ prisoners then incarcerated in the jail attached to the courthouse. To treat this simple demonstration as evidence of such a danger or of intent to obstruct justice would infringe the right of freedom of speech, Pennekamp v. Florida, 328 U.S. 331, 347 (1946), and thus Mr. Cox has been convicted without evidence of any crime which could constitutionally be proscribed by the legislature of Louisiana. Such a conviction constitutes a denial of due process of law under the Fourteenth Amendment. Thompson v. Louisville, 362 U.S. 199 (1960), Garner v. Louisiana, 368 U.S. 157 (1961); Taylor v. Louisiana, 370 U.S. 154 (1962).

While this statute has not previously been construed

by the Supreme Court of Louisiana, we must assume that merely demonstrating to protest an arrest is not, "because it could not be", Thompson v. Louisville, 362 U.S. 199, 206 (1960), enough to show a clear and present danger to the administration of justice or of intent to obstruct justice or influence an officer of the court. Concepts applied by the Louisiana Supreme Court in analogous cases support this. In Graham v. Jones, 200 La. 137, 159, 171, 179, 183, 7 So.2d 688, 695, 699, 702, 703 (1942), the clear ~~&~~ and present danger rule outlined by this Court in Bridges v. California, 314 U.S. 252 (1941) was applied to dismiss five convictions for contempt by publication. In State v. Daniels, 236 La. 998, 109 So.2d 896 (1959), a rigorous standard of intent was required for a statute similar to the one in this case. In that case the defendant, a convict who had struck a prison guard, was charged with the crime of "Public Intimidation", being the use of force upon a public officer "with the intent to

influence his conduct in relation to his position, employment, or duty." L.S.A.-R.S. 14:122. The Louisiana Supreme Court reversed the conviction on the ground that merely to have struck the guard was not enough to show the required intent. The Louisiana Supreme Court has failed in this case to apply the rigorous standard for clear and present danger and for intent which it has established in similar cases, and it has thus affirmed a conviction of crime based upon no evidence of any acts which might ~~constitutionally~~ be punished as criminal under the United States Constitution or the laws of Louisiana

Discriminatory Administration of the law

Passing from the construction of the statute involved here to the manner of its administration, the facts in this case show that the statute was used by the state and city authorities to discriminate against active campaigning for integration of the races. The demonstration in this case was carried out in the manner prescribed by the chief of police and the sheriff, and they were willing to permit and did permit

at lunch-counters

the demonstration until Mr. Cox advocated a sit-in; only then did the demonstration seem to them a violation of law (T. 364, 376). Under the decisions of this Court, to permit a demonstration until it advocates ideas with which the authorities or the general public disagree is a discriminatory application of the law which constitutes both an interference with freedom of speech and a denial of equal protection of the laws under the Fourteenth Amendment. See Niemotko v. Maryland, 340 U.S. 276 (1951); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Terminiello v. Chicago, 337 U.S. 1 (1948).

The question of the repugnancy to the Constitution of the Louisiana statute concerning demonstrations in or near a courthouse, L.S.A.-R.S. 14:401 both on its face and as applied, is a most important and pressing problem. Like the breach of the peace statute under which the Rev. Mr. Cox has been convicted in the companion case to this, arising out of the same demonstration,* the statute in this case is a

* A jurisdictional statement for appeal to this Court was filed on January , 1964. The statute mentioned is L.S.A.-R.S. 14:103.1 (1960). ~~See footnote to p. 1, supra.~~ Two ~~more~~ more cases arose out of the events in Baton Rouge on December 15, 1961, in the effort to stifle protest against segregation. See footnote to p. .

powerfully repressive influence on freedom of speech. The peaceful protest against segregation is surely one of the most important means of political expression of our time, and the question whether a statute may validly be drawn or construed and applied in such a way as to kill that form of expression is one of the most important problems before this Court. Unless the decisions of the Supreme Court of Louisiana is reversed, it will act as a prior restraint on speech against racial discrimination. Smith v. California 361 U.S. 147 (1959).

2. Segregated courtroom

The segregation in the courtroom at the trial of this case, though it presents no appealable issue under 28 United States Code § 257(2), does present a most urgent federal question affecting the administration of justice. The case of Johnson v. ~~Irginia~~ Virginia, 373 U.S. 61 (1963), in which this Court reversed the conviction of the defendant, a Negro, for contempt for sitting in the section reserved for whites

in a state courtroom, has established the proposition that segregation of a courtroom by state action is a denial of equal protection of the laws.

It is perfectly clear on the record in this case that the courtroom here, like that in the Johnson case, was segregated by action of the judge (T. 5; supra, p. 1). In the companion case to the present one, the Louisiana Supreme Court distinguished the Johnson case on the ground that the defendant here was not the person discriminated against in the courtroom. ___ La. at ___, 156 So.2d 448, 456, (1963). This decision begs the question whether racial discrimination against persons in the courtroom is not also discrimination against the defendant. It leaves open entirely the question whether the appellant here had a fair trial, or could have had one, in a courtroom blatantly administered in an unconstitutional way.

It is evident, at the outset, that a denial of

equal protection of laws in the administration of justice is a denial of equal protection of the laws to the defendant tried under such administration, see Eubanks v. Louisiana, 356 U.S. 584 (1958)(discrimination in selection of grand and petit jury). Moreover, in the cases of demonstrations against segregation, this unconstitutional administration of justice is a denial of due process of law for the reason that it affects the decisions of the trial courts. In a case such as this, where the trial judge is required to decide whether or not a demonstration against segregation constitutes a clear and present danger to the administration of justice, Wood v. Georgia, 370 U.S. 375, 385 (1962), a question entailing a large area of discretion about the effects of segregation and integration upon the public mind, the presence of segregation in the courtroom must necessarily affect his decision. If he not only has the segregated courtroom before his eyes, but administers it as well, as he did here, (T. 5, supra, p.) the effect is still stronger. If the unconstitutional administration of the court affects its decisions upon the law

and the facts, it is a denial of a fair trial under the due process clause of the Fourteenth Amendment to the Constitution. Cf. Irvin v. Dowd, 366 U.S. 717 (1961).

The segregation of the courtroom, furthermore, has denied the Rev. Mr. Cox a public trial, within the meaning of the Sixth Amendment. The requirement of a public trial is applicable to trials in state courts under the due process clause of the Fourteenth Amendment, Re Oliver, 333 U.S. 257 (1948). Two of the bases for the requirement of a public trial, as outlined by Dean Wigmore, are to discover new witnesses and make existing witnesses disinclined to falsify. Wigmore on Evidence, Section 1834 (1940 Ed.). These two elements of the requirement have been infringed in this case, where the officers who made a count of the persons present, inside and outside the courtroom, found that colored people were waiting to get in, while seats were empty in the courtroom (T. 340-341, in the Appendix at pp. 42a-45a).

These people, had they been in the courtroom, might have influenced the witnesses who appeared toward greater veracity, and more important, they might have included among themselves some further witnesses. To exclude them in a discriminatory way was to deny the petitioner the essential elements of a public trial. Cf. United States v. Kobli, 172 F.2d 919 (3 Cir. 1949).

The question whether it is a denial of equal protection of the laws and of a fair and public trial to try a case involving freedom of speech about racial discrimination in a courtroom segregated by state action, has not been squarely presented to this court before. It raises very basic questions as to what sanctions ought to be used by the federal government to prevent unconstitutional acts of segregation by the states and what effect such unconstitutional segregation has upon the state administration of criminal justice. This Court has the power to reverse a state conviction, because of the

It appears to me that the many grand jury cases involving exclusion of negroes from same were reversed on the equal protection clause. There has never been any holding to the effect that if in fact the defendant got a fair trial exclusion from the jurie was not a violation. Brown v Board and other equal protection case and its progeny held that schools, bus transportation, golf courses, etc cannot be segregated. It would appear that this principle, namely segregation in public facilities is per se a violation of equal protection is so staunchly entrenched now that as a matter of law any trial held in a segregated courtroom is void.

Further the grand jury exclusion cases use a civil standard of proof to the defendants advantage that we can use herein. Once the defendant made a prima facie case of exclusion the state had to overcome the prima facie case or the exclusion was conclusively proved. Here, we have the judges admission of segregation hence a prima facie case.

unconstitutional administration of justice, in the effort to impose effective sanctions for the violation of constitutional rights, Mapp v. Ohio, 367 U.S. 643 (1961), and in a case such as this, where the unconstitutional administration must influence both the decision of the judge and the publicity of the trial, it is essential that the power be used.

It is submitted that the statute here involved, L.S.A.-R.S. 14:401, like the statutes involved in the companion case arising out of the same demonstration, is repugnant to the right ~~xx~~ of freedom of speech under the Constitution of the United States, and that the decision of the Louisiana Supreme Court in favor of the validity of this statute is in error. It is further submitted that this statute has been administered in a manner which denied to appellant due process of law and equal protection of the laws. We believe that the questions presented by this appeal are substantial and of the utmost

public importance.

Respectfully submitted,

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THE NATIONAL CONFERENCE OF CHRISTIANS AND JEWS, INC.

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March 9, 1964

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Mr. Carl Rachlin
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Congress of Racial Equality
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MAR 10 1964

Dear Carl:

In regard to your letter of March 2 asking if the NCCJ can assist in obtaining the cooperation of lawyers in Northern as well as Southern communities to give advice to local people and to assist persons arrested in civil rights activities, the NCCJ of course wishes to do all that it can.

As you know, the regional offices of the NCCJ exercise a great deal of local authority, as do the local chapters of CORE, in their response to local conditions. Consequently, approaches for advice and suggestions in finding lawyers to assist in civil rights matters would have to be made and determined locally.

In many NCCJ regions, of course, cordial relationships exist between NCCJ staff and local human relations groups, including those in the civil rights movement. Wherever possible, therefore, I am sure that NCCJ directors will be glad to help with advice and recommendations in this matter of need for legal assistance.

In addition, I have sent a memo to all regional offices of the NCCJ telling them of your request and indicating the concern of our national office. The responsibility of local offices for decision-making concerning local problems must be respected, naturally, but NCCJ offices have been at the same time encouraged to cooperate with CORE wherever such cooperation is feasible and justified. While the NCCJ's power to act as a mediator in community disputes must not be compromised, it is clear at the same time that the NCCJ has a clear commitment to the cause of racial justice and cannot remain "neutral" in matters where a clear moral consensus has been arrived at. The rights of all citizens to legal advice and representation are certainly within this consensus.

I hope that this response will be helpful in the problem and that CORE will not hesitate to call upon NCCJ directors for assistance in finding lawyers.

May I also suggest that you approach Catholic Interracial Councils and Catholic Lawyer's Guilds wherever they exist.

Best regards.

Cordially,

Richard Horchler

RH:ls

DRAFT
PGC:mf
12/2/63

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. _____

ELTON
B./~~XxxXONx~~ COX, Petitioner

v.

STATE OF LOUISIANA, Respondent

Petition for a Writ of Certiorari to the
Supreme Court of Louisiana

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana entered in the above-entitled cases on June 28, 1963, which affirmed verdicts of conviction rendered by the District Court for the Nineteenth Judicial District, Parish of East Baton Rouge, Louisiana (hereinafter referred to as the "District Court") upon application for writs of mandamus, certiorari and prohibition.

CITATIONS TO OPINIONS BELOW

The oral opinion of the judge of the District Court, given at the end of the trial of these cases, is unreported and is printed in Appendix B hereto, infra, p.____. The opinion of the Supreme Court of Louisiana denying the application for writ of mandamus certiorari and prohibition, and affirming the judgment of the District Court, reported in _____ La. _____, 156 So. 2d 448 (1963), is printed in Appendix B hereto, infra, p._____.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on June 28, 1963, and rehearing was denied by that Court on October 9, 1963. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1257(3).

QUESTIONS PRESENTED

Whether the Louisiana breach of the peace statute, Louisiana Statutes Annotated, R.S. 14.103.1, as applied to petitioner, by infringing his right of free speech and free assembly and to petition for redress of grievances, denied him due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution.

Whether the Louisiana statute against obstructing the sidewalk, Louisiana Statutes Annotated, R.S. 14-100.1, as applied to petitioner, by infringing his right to free speech and free assembly, and to petition for redress of grievances, denied him due

process of law and equal protection of the laws under the Fourteenth Amendment to the constitution.

Whether the Louisiana breach of the peace statute, Louisiana Statutes Annotated, .R.S. 14:103.1, as applied to petitioner, is so vague and uncertain, as to violate due process of law under the Fourteenth Amendment to the constitution.

Whether petitioner was denied equal protection of the laws and due process of law under the Fourteenth Amendment to the constitution by being tried in a courtroom that was segregated due to state action?

STATUTES INVOLVED

The statutory provisions involved are Louisiana Statutes Annotated, R.S. 14:103.1 and R.S. 14:100.1. They are printed in Appendix A, infra, p._____.

STATEMENT

On December 14, 1961, twenty-three people

*

who were picketing stores in the downtown area of

Baton Rouge, Louisiana, in protest against segregation were arrested (T.348,400,458) and were incarcerated in the jail adjacent to the District Courthouse in Baton Rouge (T.348,466). The following day, shortly before noon, students from a nearby Negro college, Southern University, began to gather about the Old Capitol Building in Baton Rouge. (T.251,437,510-512). At about noon the students marched down to the Courthouse under the leadership of the petitioner, Rev. B. Elton Cox, a field Secretary for the Congress of Racial Equality. (T.468,513).Rev. Cox conferred with the Sheriff, the Chief of Police and other law-enforcement officers, and explained to them that the students intended to demonstrate in protest against segregation in the stores and against the arrest of the pickets. He further presented a program for the demonstration. (T.351,371,470,515). The Sheriff stated on cross-examination, that he had "no objection" to the

demonstration under that program (T.363-364), ~~and~~ the Chief of Police gave petitioner seven minutes for the demonstration (T.101,516-517), and limited it to the West side of the street, opposite the Courthouse (T.371,516).

The students, more than fifteen hundred of them, (T.51,71,269,313) assembled on the sidewalk on the West side of the street. A curious group of white people gathered on the opposite side of the street (T.20,28,167). More than seventy-five policemen and sheriff's deputies were present, who, according to the inspector who was in charge of the policemen, "could handle any situation that should arise." (T.329). There was no violence ~~at any time~~ during the demonstration; the testimony was in agreement, on the contrary, that Rev. Cox was in complete control of the crowd at all times. (T.38,107,257,318,355). In the course of the demonstration, the group pledged allegiance to the flag, recited the Lord's Prayer,

showed signs protesting segregation and sang songs. The prisoners in the jail heard the singing and began to sing in response (T.467). Whereupon the demonstrators, hearing the prisoners, uttered a cheer. (T.54,60,353). Rev. Cox made a speech (T.42,235,255,325,516-518) which contained nothing violent (T.29,44,158, 268,302), and in fact Rev. Cox forbade violence (T.37,299,363) in the demonstration, warning that if any of the demonstrators was attacked, he was not to fight back. According to his own testimony, Rev. Cox said at the close of his speech:

> ". . . all right. It's lunch time. Let's go eat. There are twelve stores we are protesting. A number of these stores have twenty counters, they accept your money from nineteen. They won't accept it from the twentieth counter. This is an act of racial discrimination. These stores are open to the public. You are members of the public. We pay taxes to the Federal Government and you who live here pay taxes to the state."

(T.518). The testimony of other witnesses as to the content of the speech was substantially the same

(T. ,29,37,53,105,153,196,272-3). That was the sticking-point with the Chief of Police and the Sheriff, (T.364,376) who then commanded the demonstrators to break up the demonstration. Tear gas was released into the crowd, which then broke up immediately. (T.377).

Rev. Cox was arrested and charged with criminal conspiracy, breach of the peace, obstructing the sidewalk, and demonstrating in front of a court-house with the intent of obstructing justice. He was tried in the District Court at Baton Rouge, the same one before which the demonstrators had gathered, on January 29 through 31, 1962, without a jury. The criminal conspiracy charge was dismissed, but he was convicted on the other three counts. In the course of his summation in regard to breach of the peace, the trial judge stated:

> xxx It must be recognized to be inherently dangerous and a breach of the peace to bring 1,500 people, colored people, down in the predominantly white business district in the

City of Baton Rouge and congregate across the street from the courthouse and sing songs as described to me by the defendant as the CORE National Anthem carrying lines such as 'black and white together' and to urge those 1,500 people to descend upon our lunch counters and sit there until they are served. That has to be an inherent breach of the peace . . .". (T.545; Appendix B. hereto, p. ____). Rev. Cox was sentenced* to serve four months in jail and pay a fine of $200.00, or in default thereof to serve four months additional for breach of the peace, and for obstructing the sidewalk he was sentenced to serve five months in jail and pay a fine of $500.00, and in default thereof to serve five months additional. For obstructing justice he was sentenced to serve one year in jail and to pay a fine of $5,000.00, or in default thereof to

* The Supreme Court of Louisiana reviewed the sentencing procedures in the convictions in these cases for breach of the peace and obstructing the sidewalk, and found them to be invalid, Cox v. ~~Dumont~~ Clemmons, 243 La. 264, 142 So. 2d 794 (1962). The petitioner was subsequently resentenced.

The conviction for obstructing justice was later reviewed by the Supreme Court of Louisiana by way of appeal.*

serve one year additional.* The Supreme Court of Louisiana reviewed the convictions for obstructing the sidewalk and breach of the peace by way of applications for supervisory writs, mandamus, certiorari and prohibition.** ~~The obstructing justice charge has been reviewed by way of appeal~~ and it is the denial of the applications ~~application for supervisory writs~~ for which review is sought in this Court.*

** Under Article VII, Sec. 10, Louisiana Constitution, the Supreme Court of Louisiana has general supervisory powers over inferior courts, but no appeal is available in criminal cases unless a sentence of more than six months or a fine of more than $300.00 has been imposed. Despite the fact that the fine imposed under the obstructing justice charge was $500.00 the Supreme Court of Louisiana reviewed the case by application for supervisory writs.

* ~~This case~~ decision in that was affirmed by the Supreme Court of Louisiana on November 12, 1963, and petitioner has sought a rehearing in that Court.

The Federal questions presented by these cases were raised in the District Court by a motion to quash prior to trial (R._____), and by motions in arrest of judgment and for a new trial (R._____). Each of these motions was denied (R._____), and each of the motions and opinions ~~of these motions and opinions~~ appears in Appendix C, infra, p. ____. In petitioner's application to the Louisiana Supreme Court for writs of certiorari, mandamus and prohibition in these cases, reference was again made to the Federal questions sought to be reviewed.

There is much clear evidence on the record of the segregation in the courtroom by order of the District Court judge. The judge took judicial notice of this fact, stating:

> "THE COURT: Also, let the record show that it has been the practice and custom in the East Baton Rouge Parish Courthouse for many, many years, and in the purpose of maintaining order in the courtroom, separate portions are placed in the courtroom for both colored and white, and let the record especially show that the judge in this

case ordered that half of the seats that were formerly reserved and available for white people are now being occupied and filled by colored people."

(T. 5-6, Appendix D, infra, p.____). Further, the Deputy Sheriff in charge of the jail and a second deputy testified as to the composition of the courtroom, the numbers of empty seats reserved for whites, and the number of colored people waiting in the corridors of the courtroom. (T.340-344). These passages in the record appear in Appendix D, infra, p._____.

REASONS FOR GRANTING THE WRIT

Conflict with decisions of this court.

1. Unconstitutionality of Statutes.

The demonstration which occurred in this case is a classic example of a peaceful assembly for the redress of grievances, et al., Edwards v. South Carolina, 372 U.S. 299 (1963), and as such it is within the protected area of "free trade in ideas" under the First Amendment. When the legislature or the courts

establish a rule of law which may infringe upon the expression of ideas, the law must be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state." Cantwell v. Connecticut, 310 U.S. 296, 311 (1940), quoted by Harlan, J., concurring in Garner v. Louisiana, 368 U.S. 137, 202 (1961). Under this standard, as applied in decisions of this court, the lower the breach of the peace statute under which Rev. Cox was convicted, Louisiana Statutes Annotated, R.S. 14: 103.1, Appendix A, infra, p._____, is unconstitutional. The statute is drawn so as to punish the acts of congregating on a sidewalk and failing to "move on, when ordered so to do by any law enforcement officer xxx", when these acts are done "under circumstances such that a breach of the peace may be occasioned thereby." (Emphasis added). This phrase plainly may be used to punish more than conduct which presents a clear and present danger to the interest of the state, and logically draws within its ambit the free expression of ideas which

Blackwell
no true parallel

is protected by the First Amendment. A similar phrase was used by the Supreme Court of South Carolina in defining the common law offense of breach of the peace,* and in Edwards v. South Carolina, 372 U.S. 299 (1963), this interpretation ~~the common law of South Carolina in regard to~~ breach of the peace was held to infringe the rights of demonstrators to freedom of speech and freedom to petition for redress of grievances. See also Winters v. New York, 333 U.S. 507 (1948).

The vague phraseology of the Louisiana breach of the peace statute permits the officers of the state, in their discretion, to punish speech which they consider to be dangerous because it may produce disturbance and unrest, as they have done in this case, and it is precisely this official interference with speech that the First Amendment is intended to prevent. Terminiello v. Chicago, 337 U.S. 1 (1948).

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* "x x x It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. x x x". [redacted]t, quoted in 372 U.S. at _____. 12 S.E. 2d at 249

The application of the breach of the peace statue to petitioner Cox by the Supreme Court of Louisiana and the Baton Rouge District Court, below, have only served to increase the conflict with the decisions of this Court. The Supreme Court of Louisiana in 156 So. 2d at 454, Appendix B, infra, p. _____, attempted to distinguish the Edwards case, supra, on the ground that the present case involved a precisely drawn regulatory statute, similar to a traffic regulation statute, situation specifically left open in the Edwards case, 372 U.S. 299, _____. In fact, however, the Louisiana Supreme Court failed to define the breach of the peace statute as a narrowly drawn regulatory statute, for that court commented upon the statute as follows:

> "LSA - R.S. 14:103.1 is said to be ambiguous for it is not clear whether the prosecution must show an actual disturbance or only circumstances such that a disturbance may be occasioned. In either event, however, we think there is no ambiguity in that language of the statute for to disturb the peace 'in Louisiana means' xxx to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet!"

Town of Ponchatoula v. Bates, 173 La. 824, 138 So. 851 (1932) "_____ La. at _____, 156 So. 2d at 448.

This statute, as interpreted by the highest court of the state, thus punishes speech protected by the First Amendment, under the decision in Terminiello v. Chicago, 337 U.S. 1 (1948). The terms used by the ~~state~~ court in defining the statute held invalid in that case were similar to the terms used by the Louisiana Supreme Court here, and the rationale used by ~~that~~ this Court in deciding that case is equally applicable to the present case:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky v. New Hampshire, supra (315 US pp 571, 572) ~~86 L ed 1034, 1035, 62 S Ct 766~~), is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." 337 U.S. at 4

The definition of disturbing the peace used in this case by the judge of the District Court (T. 545 quoted supra, p. _____), is even more objectionable under the standard of the Terminiello case. The judge there took

the position that a mass demonstration against segregation was an "inherent breach of the peace."

This rule deliberately restricts and discriminates against speech, however peaceful, which tends to arouse a complacent public from its acceptance of segregation, and such a standard is condemned by Terminiello.

The statute against obstructing the sidewalk, Louisiana Statutes Annotated, R.S. 14:100.1, Appendix A infra, p. ____, Boswell as the breach of the peace statute as well, were administered by the state and city authorities so as to discriminate against active campaigning for integration of the races. The demonstration in this case was not violent and did not advocate violence, as the officers knew (R. 299, 363, supra, p. _____), and they did not pretend that the demonstration was broken up on account of violence. The city and state authorities were willing to permit and did permit the demonstration in this case until the petitioner advocated a sit-in, when suddenly the demonstration seemed to

them a disturbance of the peace. (T.364, 376, discussed supra, p.____).* Under the decisions of this Court, to permit a demonstration until it advocates something with which the authorities, or the general public disagrees, however emphatically, is a discriminatory application of the law which constitutes both an unwarranted interference with freedom of speech and a denial of equal protection of the laws under the Fourteenth Amendment. See Niemotko v. Maryland, 340 U.S. 276, 273 (1951); Terminiello v. Chicago, 337 U.S. 1 (1948).

Furthermore, the conduct of the state and city officers in this case reveals the vice of the clause in the Louisiana breach of the peace statute which punishes a failure to "xxx move on, when ordered so to do by any law enforcement officer xxx." (Louisiana Statutes Annotated, R.S. 14:103.1, Appendix A supra, page _____).

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* The judge of the District Court agreed with them in ruling that demonstrating against segregation by singing a song with the lines, "black and white together", and urging a sit-in is an "inherent breach of the peace." (T.545, quoted supra, p.____)

This provision is void not only when it is applied in such a way as to discriminate against protected speech, as it was in this case, but on its face as well, since it puts into the hands of law enforcement officers the power to control street demonstrations, without providing any standards for the protection of the peaceful expression of ideas. Winters v. New York, 333 U.S. 507 (1948).

2. Segregated Courtroom.

The case of Johnson v. Virginia, 373 U.S. 61 (1963), in which this court reversed the conviction of the defendant, a Negro, for contempt for sitting in the section reserved for whites in a state courtroom, has established the proposition that segregation of a courtroom by state action is a denial of equal protection of the laws. It is perfectly clear on the record in this case that the courtroom was segregated by action of the judge. (T.5; Supra, p._____). The Louisiana Supreme Court distinguished the Johnson case on the ground that the defendant here was not the person discriminated

against (in the courtroom) _____ La. at _____, 156 So. 2d at 456, Appendix B infra, p._____, ~~in the courtroom~~. Hence the question left open is whether the defendant had a fair trial, or could have had one, in a courtroom administered in an unconstitutional way. In a case such as this, where the trial judge is required to decide whether or not a demonstration against segregation constitutes a clear and present danger to a substantial interest of the state, Cantwell v. Connecticut, 310 U.S. 296, 307 (1940), a question entailing a large area of discretion about the effects of segregation and integration upon the public mind, the presence of segregation in the courtroom must necessarily affect his decision. If he not only has the segregated courtroom before his eyes, but administers it as (as he did here) well, the effect must be still stronger. (When, as here,) ~~If~~ the unconstitutional administration of the court affects its decisions upon the law, it (must be) ~~is~~ a denial of a fair trial (under the Due Process clause of the Fourteenth Amendment).

The segregation of the courtroom, furthermore, has denied Rev. Cox a public trial, within the

of that phrase

meaning of the Sixth Amendment. The requirement of a public trial is applicable to trials in state courts under the Due Process Clause of the Fourteenth Amendment, Re Oliver, 333 U.S. 247 (1948). Two of the bases for the requirement of a public trial, as outlined by Dean Wigmore, are to discover now witnesses and make existing witnesses disinclined to falsify the evidence. Wigmore on Evidence, Section 1834 (1940 Ed.). These two elements of the requirement have been infringed in this case, where the officers who made a count of the persons present, inside and outside the courtroom, found that colored people were waiting to get in, while seats were empty in the courtroom. (T.340-341, Appendix D, infra p._____). These people, had they been in the courtroom, might have influenced the witnesses who appeared toward greater veracity, and more important, they might have included among themselves some further witnesses. To exclude them in a discriminatory way was to deny the petitioner the essential elements of a public trial. Cf. United States v. Kobli, 172 F. 2d 919 (3 Cir. 1949).

Importance of the Federal Questions Presented

When a regulatory statute is drafted in such a general way as to include within its sanctions the protected expression of ideas, it presents a continuing and pervasive threat to freedom of speech. Thornhill v. Alabama, 310 U.S. 88 (1940). To remove and to lay down guidelines ~~for the prevention of~~ to avoid them such restraints on freedom of speech has long been one of the great tasks of this Court.

As this Court noted in Garner v. Louisiana, 368 U.S. 157, 168 (1961), which involved an earlier Louisiana breach of the peace statute, the statutes involved here were passed in the attempt to punish sit-ins and other forms of protest against segregation. The peaceful protest against segregation is surely one of the most important forms of political expression in our times, and the question whether a statute may validly be drawn or administered in such a way as to kill that form of expression is one of the most important problems presented to this court in this or any other time.*

Footnote

* In connection with this demonstration ~~effort~~ in Baton Rouge alone there has been a maze of litigation in the effort to stifle the protest against segregation. Two of these cases are, ~~CORE~~ Clemmons v. CORE, 323 F. 2d 54 (5 Cir. 1963) and State of Louisiana v. Moore (unreported). Review of these cases has been sought in this Court.

The ~~question whether the~~ trial of the petitioner in a courtroom segregated by state action raises a question of ~~race~~ fair and ~~or~~ public trial which has not been squarely presented to this court before. It raises very basic ~~questions~~ problems as to what sanctions ought to be used by the Federal government to prevent unconstitutional acts of segregation by the states and what effect such unconstitutional segregation has upon the state administration of criminal justice. It is perfectly clear that this court has the power to reverse a state conviction because of the unconstitutional administration of justice, in the effort to impose effective sanctions for the violation of constitutional [redacted]ce rights, see Mapp v. Ohio, 367 U.S. 643 (1960), and in a case such as this, where the unconstitutional administration must influence both the decision of the judge and the publicity of the trial, it is essential that the power be used.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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File copy

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No. 24 and 49

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

B. Elton Cox,

Appellant,

against

State of Louisiana,

Appellee.

On Appeal From The Supreme Court of Louisiana

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Appellant Rev. B. Elton Cox appeals from two judgments of the Supreme Court of Louisiana entered in the above-entitled case. The first (No. 24 in this Court), rendered on June 28, 1963, affirmed a verdict of conviction for the crimes of breach of the peace and obstructing the sidewalk, and the second (No. 49 in this Court), rendered on November 12, 1963, affirmed a verdict of conviction for the crime of illegally demonstrating in or near a courthouse. All verdicts had been rendered at the same time upon the same trial by the District Court for the Nineteenth Judicial District, Parish of East Baton Rouge, Louisiana, but they were heard separately by the Supreme Court of Louisiana because of the statutes governing review in Louisiana.* They were appealed to this Court as separate cases, but a single brief for both is being submitted, because there are common issues of fact and law, and because the cases are to be argued together. Appellant's motion to proceed in forma pauperis and without a printed record has been granted by this court, and accordingly a short appendix is submitted with this brief.

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* Under Article VII, Sec. 10, Louisiana Constitution, the Supreme Court of Louisiana has general supervisory powers over inferior courts. In addition appeal is available in criminal cases where a sentence of more than six months or a fine of more than $300.00 has been imposed. The convictions for breach of the peace and obstructing the sidewalk were reviewed under the former provision, and the conviction for illegally demonstrating was reviewed under the latter.

Opinions Below

The oral opinion of the judge of the District Court given at the end of the trial of this case is unreported and is printed in the Appendix p. 7a . The opinion of the Supreme Court of Louisiana affirming the conviction for breach of the peace and obstructing the sidewalk (No. 24 in this court) is reported at 244 La. 1087, 156 So. 2d 448 (1963). (Appendix p 17a) The opinion of the Supreme Court of Louisiana affirming the conviction for illegally demonstrating in or near a courthouse (No. 49 in this court) is reported at 245 La. 303, 158 So. 2d 172 (1963) (Appendix p. 34a).

Jurisdiction

Appellant was convicted under the Louisiana breach of the peace statute, L.S.A.-R.S. 14: 103.1, and the Louisiana statute punishing obstruction of the sidewalk L.S.A.-R.S. 14:100.1, which are set out in the Appendix at pp. 19, 29, respectively. Affirming the conviction the judgment of the Supreme Court of Louisiana was entered on June 28, 1963; rehearing was denied on October 9, 1963. The appeal to this Court was filed on January 8, 1964.

Appellant was further convicted under a Louisiana statute, L.S.A.-R.S. 14:401, prohibiting demonstrations in or near a courthouse of the State of Louisiana, with the intent of interfering with, obstructing or impeding the administration of justice or of influencing any judge, juror, witness or

court officer in the proper discharge of his duty, which is set out in the Appendix at p. 4-a. Affirming this conviction the judgment of the Supreme Court of Louisiana was entered on November 12, 1963, rehearing was denied by that court on December 20, 1963. Appeal to this court was filed on March 19, 1964; probable jurisdiction was noted in both cases May 4, 1964, 377 U.S. 921.

The jurisdiction of this court to review both judgments by appeal in this case is conferred by Title 28 of the United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the decision on appeal in this case: Cantwell v. Connecticut, 310 U.S. 296 (1940); Winters v. New York, 333 U.S. 507 (1948); Herndon v. Lowry, 301 U.S. 242 (1937).

Qeuestions Presented

By reason of its vagueness and uncertainty, is the Louisiana breach of the peace statute L.S.A.-R.S. 14.103.1 repugnant to the due process clause of the Fourteenth Amendment to the Constitution?

Because they infringe appellant s right to freedom of speech and freedom of assembly, and to petition for redress of grievances, are the Louisiana breach of the peace statute, L.S.A.-R.S. 14:103.1, the Louisiana statute against obstructing the sidewalk, L.S.A.-$.S. 14:100.1, and the Louisiana statute punishing demonstrations in or near a courthouse L.S.A.-R.S. 14:401, as interpreted and applied to appellant by the courts of Louisiana, repugnant to the due process clause of the

Fourteenth Amendment to the Constitution?

Has the discriminatory administration of all the Louisiana statutes involved in this case deprived appellant of equal protection of the laws and due process of law under the Fourteenth Amendment to the Consitution?

Since there is no evidence to support the charge under the said statute is the conviction of appellant under the Louisiana Statute punishing demonstrations in or near a courthouse, L.S.A.-R.S. 14:401, repugnant to the due process clause of the Fourteenth Amendment to the Constitution?

By being tried in a courtroom that was segregated as a result of state action has appellant been denied equal protection of the laws and due process of law under the Fourteenth Amendment to the Constitution?

Statutes Involved

The statutes involved are Louisiana Statutes Annotated R.S. 14:100.1, R.S. 14:103.1 and R.S. 14:401. They are printed in the Appendix at pp. 1a, 2a, 4a respectively.

Statement

Protesting against segregation and discrimination against Negroes on December 14, 1961, twenty-three youngsters picketing stores in the downtown area of Baton Rouge, Louisiana were arrested (T. 348,400,458)* and incarcerated in the jail adjacent to the District Courthouse in Baton Rouge (T. 348,466). Shortly before noon the following day,

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* The transcript of the trial in the District Court, though

students from a nearby Negro college, Southern University, began to gather about the old Capitol Building in Baton Rouge (T. 251,437,510-512). At that time none of the twenty-three arrested the previous day was being tried or arraigned (T. 201-203,346-347). About noon the students marched to the Courthouse under the leadership of the appellant, the Rev. B. Elton Cox, a Negro field secretary for the Congress of Racial Equality (T. 468,513). Mr. Cox conferred with the Sheriff, the Chief of Police and other law-enforcement officers, and explained to them that the students intended to demonstrate in protest against segregation and discrimination in the stores and against the arrest of the pickets. He further presented a program for the demonstration (T. 351,371,470,515). On cross-examination the Sheriff stated that he had had "no objection" to the demonstration under that program (T. 363-364). The Chief of Police allowed seven minutes for the demonstration (T. 101,516-517), and limited it to the West side of the street, opposite the Courthouse (T.371,518).

More than fifteen hundred students (T.51,71,269,313), assembled on the sidewalk on the West side of the street. Curious white people gathered on the opposite side of the street (T. 20,28,167). In excess of seventy-five policemen and sheriff's deputies were present. According to the

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made by a court stenographer, is not physically part of the records prepared by the clerk of the Louisiana Supreme Court. To supplement the records, the transcript of the minutes of the trial, which has been submitted to this court, is referred by the symbol "T---".

inspector who was in charge of the policemen, "could handle any situation that should arise" (T. 329). No violence of any kind occurred during the demonstration; on the contrary, all testimony proved that the Rev. Mr. Cox maintained control of the students at all times (T. 38, 107,257, 318, 355). In accordance with the program described to the Sheriff the students pledged allegiance to the flag of the United States, recited the Lord's Prayer, exhibited signs protesting segregation and sang freedom songs. Responding, the students in the jail (the ones who had been arrested the previous day) replied in song (T. 46). Upon hearing the prisoners, the demonstrators uttered a cheer (T. 54, 60, 353). Mr. Cox made a speech (T. 42, 235,255,325, 516-518) which not only contained nothing of violence in it (T. 29,44, 158,268,302), but in fact directly forbade violence (T. 37,299,363). Mr. Cox advised that if any of the demonstrators should be attacked, he was not to retaliate. According to Cox's own testimony, with which other witnesses were in agreement (T. 29, 37,53,105,153,196,272-3), he said at the close of his speech:

> " * * * all right. It's lunch time. Let's go eat.
>
> There are twelve stores we are protesting. A number of these stores have twenty counters, they accept your money from nineteen. They won't accept it from the twentieth counter. This is an act of racial discrimination. These stores are open to the public. You are members of the public. We pay taxes to the Federal Government and you who live here pay taxes to the state." (T. 518)

That was the sticking-point for the Chief of Police and the Sheriff (T. 364, 376). Commanding the demonstrators to break up the demonstration, tear gas was released into the group

of students, which broke up immediately (T. 377).

The Reverend Mr. Cox was arrested and charged with criminal conspiracy, breach of the peace, obstructing the sidewalk, and demonstrating in front of a courthouse with the intent of interfering with, obstructing and impeding the administration of juctice, and of influencing a judge, witness or court officer. The trial took place without a jury on January 29 through 31, 1962, in the District Court at Baton Rouge, the very building before which the demonstrators had gathered. The criminal conspiracy charge was dismissed, but Mr. Cox was convicted on the other three counts.

For breach of the peace Mr. Cox was sentenced to serve four months in jail and pay a fine of $200.00, or in default thereof to serve four months in addition; for obstructing the sidewalk his sentence was five months in jail and a fine of $500.00; in default thereof to serve five months in addition. For illegally demonstrating near a courthouse he received one year in jail and a fine of $5000.00; in default thereof to serve one year in addition. All convictions were reviewed in the Louisiana Supreme Court, the first two by way of application for supervisory writs of mandamus, certiorari and prohibition, 244 La. 1087, 156 So.2d 448 (1963), (Appendix p.19a) and the latter by appeal, 245 La.303, 158 So.2d 172 (1963) (Appendix p.35a). In each the trial court was sustained.

Because of their repugnancy to the Constitution of the United States, the validity of the statutes involved here was called into question; other federal questions were raised in the District Court by motion to quash prior to trial (1R.16;

2R. 22)*, by motion in arrest of judgment (1R.30; 2R.13), and by motion for a new trial (1R.35; 2R 18). Each motion was denied, and with the opinions of the District Court, appear in the Appendix at pp. 53a-76a , respectively.

In the application of appellant for writs of certiorari, mandamus and prohibition against his convictions for breach of the peace and obstructing the sidewalk (No. 24) and on his appeal from the conviction for demonstrating illegally (No. 49), the validity of these statutes was again questioned on the ground of their repugnancy to the Constitution of the United States. The decisions of the Louisiana Supreme Court upheld their validity.

The record is clear that the courtroom was segregated by order of the District Court judge. The judge took judicial notice of this fact, stating:

> "The Court: Also, let the record show that it has been the practice and custom in the East Baton Rouge Parish Courthouse for many, many years, and in the purpose of maintaining order in the courtroom, separate portions are placed in the courtroom for both colored and white, and let the record especially show that the judge in this case ordered that half of the seats that were formerly reserved and available for white people are now being occupied and filled by colored people." (T. 5-6, Appendix pp. 53a .)

The Deputy Sheriff in charge of the jail and a second deputy testified as to the composition of the courtroom, the numbers

* The transcript of the record before the Louisiana Supreme Court in these two cases are referred to by the following symbols: No. 24: "1R-"
No. 49: "2R-".

of empty seats reserved for whites, and the number of colored people waiting in the corridors of the courtroom (T. 340-345). These passages in the record appear in the Appendix at pp. 16a,58a, 67a-82a. The question of the fairness of the trial was also raised in the motions in the District Court and in the application and appeal to the Louisiana Supreme Court.

Summary of Argument

I The public demonstration of protest which took place herein is a peaceable assembly protected under the Fourteenth Amendment from infringement by the states. By reason of its vagueness and uncertainty, the Louisiana breach of the peace statute, infringes that freedom of speech in a case where, as here, the charge tracks the terms of the statute, the statute must be judged on its face.

II The breach of the peace statute, the statute against obstructing the sidewalk and the statute punishing illegal demonstrations, were administered, interpreted and applied in an unconstitutional manner by the Louisiana Courts. Any demonstration which "arouses from a state of repose" constitutes a breach of the peace said the Louisiana court. A large group in simple assembly on the sidewalk creates a "willful" obstruction of the sidewalk. When the assembly is conducted in protest against an arrest, this is sufficient proof of intent to obstruct justice or influence a court officer. By so determining the Supreme Court of Louisiana failed to recognise or apply the standards laid down by this Court for cases where a state statute touches upon an area of protected expression, and thus the

conviction of the appellant resulted in a denial of due process of law. As interpreted these statutes fail to define a crime for which one may constitutionally be convicted, and they act as a restraint of freedom of speech. Furthermore, all the statutes were administered by the authorities so as to discriminate against Rev. Cox because of his protest against segregation.

III No evidence having existed under Louisiana law to prove the necessary intent, to obstruct justice or to influence a court officer, a conviction for illegally demonstrating near a courthouse constituted a denial of due process of law.

IV The trial of a Negro (particularly in a Civil Rights case) in a segregated courtroom is per se a denial of equal protection of the laws; by act of the state it implies the inferiority of the defendant, and fosters prejudice in witnesses and is based upon the prejudice of the trier of fact, in this case the Court.

V The segregation constituted a denial of a fair trial and thus a denial of elementary due process, because Rev. Cox was protesting segregation; the court showed by its maintenance of segregation both that it was opposed to the protest and that it could not appreciate whether any clear and present danger was presented by the protest, nor the basic denial of due process, based upon its own prejudice. Finally, the discriminatory exclusion of any special group of persons is a denial of a public trial.

Argument

Argument

The Reverend Mr. Cox Was Punished For Peaceful Participation In Demonstration Protected Under The Fourteenth Amendment and First Amendment.

Since the time of the American Revolution peaceful demonstration has been protected as one of the means for the people to express their grievances. The "right of the people peaceably to assemble, to petition the government for a redress of grievances," guaranteed by the First Amendment, and applicable to the states under the Fourteenth Amendment, means nothing if it does not include the right to protest peacefully by non-violent means against manifest injustice. The more powerless, the more oppressed a minority is, the more important to all society is the right of peaceable assembly. Peaceable action in the streets calling attention to the evils of discrimination has been the lifeblood of protest against racial injustice in recent years. Often it is the only means by which that "free trade in ideas," the essence of free speech, may be obtained. During the last two terms, this Court has reaffirmed the importance of nonviolent demonstration as a means of expression. Edwards v. South Carolina, 372 U.S. 229 (1963); Fields v. South Carolina, 375 U.S. 44 (1963); Henry v. City of Rock Hill, 376 U.S. 776 (1964) (hereinafter sometimes collectively referred to as the "South Carolina demonstration" cases). Involved in those cases were charges of common law breach of the peace arising out of non-violent street demonstrations in South Carolina. Each

resembles the case at bar in many respects. In Edwards, the demonstration took place on the State House grounds. One hundred eight-seven demonstrators sang songs, listened to a speech, but did not obstruct pedestrian or vehicular traffic.

In the Fields case, a thousand demonstrators were found by the South Carolina Supreme Court to have blocked the sidewalks and streets in Orangeburg, South Carolina, during a demonstration, 240 S.C. 366, 126 S.E. 2d 6 (1962). The Henry demonstrators assembled in front of the City Hall at Rock Hill, and were found to have sung so loudly that work was disrupted in the City Hall. 241 S.C. 427, 128 S.E. 2d 775 (1962). As here, police protection was ample, and little or no threat of violence from bystanders.

Holding that the demonstrations were protected activities, this court stated in Edwards:

> " * * * the circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form * * *" 372 U.S. at 235.

So important is speech, that in the above cases this court held it might not be proscribed as a common-law breach of the peace, defined by the Supreme Court of South Carolina:

> "By 'peace,' as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons in political society." 239 S.C., at 343-344, 123 S.E. 2d, at 249.

The South Carolina Court had found, in effect that any disturbance of "tranquility" is a breach of the peace; but as this Court said in Terminiello 337 U.S. 1, 4 (1948):

> " * * * freedom of speech*** is * * * protected

> against censorship or punishment, unless shown
> likely to produce a clear and present danger of
> a serious substantive evil that rises far above
> public inconvenience, annoyance or unrest * * *"

A conviction for disturbance of tranquility has the effect of making "criminal the peaceful expression of unpopular views," Edwards v. South Carolina, 372 U.S. 229, 237 (1962); the greater the opposition of the community to the ideas expressed, the more the tranquility will be disturbed. Opposition in the community to the demonstration is not enough to justify a limitation on freedom of speech. It is the duty of the police to preserve and to protect the rights of demonstrators to exercise their freedom. See Terminiello Supra. Were this not the case all that would be essential to inhibit speech would be threats by those who are not pleased by the views of the speaker. Upon receiving the complaint the police then make the speaker discontinues or risk arrest in effect responding to the threats, and giving in to blacknail.

THE LOUISIANA STATUTE PUNISHING BREACH OF THE PEACE IS UNCONSTITUTIONAL ON ITS FACE UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Suffering from the same infirmities as the common-law rule ~~found uncons~~ found unconstitutional by this Court in the South Carolina demonstration cases, the Louisiana breach of the peace statute under which Rev. Cox was convicted in this case, L.S.A.-R.S. 14:103.1, is unconstitutional for similar reasons under other rulings of this Court. As with other regulatory statutes found invalid on their face ~~is that~~, and while the state has an interest, in the prevention of violence, the statute is

so vague and indefinite it permits the punishment of forms of expression which are consitutionally protected. Schneider v. State, 308 U.S. 147 (1939); Thornhill v. Alabama, 310 U.S. 88 (1940). Such a statute acts as a prior restraint of freedom of speech, casting a pall over every form of expression that falls in its way. In Thornhill, supra, at 97-98 this Court said:

> " * * * The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonable be regarded as within its purview. * * *"

No ascertainable standard of conduct short of interference with constitutional rights is set forth. For a man peaceably to exercise his freedom of speech and to escape punishment is nigh impossible under the statute. See Herndon v. Lowry, 301 U.S. 242, 261 (1937).

Vividly illustrated on the face of the Louisiana statute punishing breach of the peace are these vices. Because Mr. Cox was charged and convicted upon information and evidence couched in the general terms of the statute and not charged with nor convicted of any crime more carefully defined than the crime described in the statute, we urge, under such circumstances, this Court should hold, Thornhill, supra, Terminiello, supra, that the statute must be considered improper on its face.

Anyone who crowds or congregates on a sidewalk or street and fails to "disperse or move on, when ordered to do so by any law enforcement officer," ... "with intent to provoke a breach of the peace, or under circumstances such that a breach of

the peace may be occasioned thereby" violates the statute L.S.A.-R.S. 14:103.1.

"Breach of the peace" is not defined in the statute; in attempting to comply, a citizen is thrown back upon the general concept of breach of the peace embodied in the common law. American Jurisprudence states:

> peace "In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence or tending to provoke or excite others to break the peace, or, as sometimes said, it includes any violation of any law enacted to preserve peace and good order.* * *" 8 Am. Jur. 834 (1937 Ed.).

This notion, concerned with some ill-defined unrest, is fully as vague as the concept disapproved by this Court in the South Carolina demonstration cases. The Louisiana concept of breach of the peace, as expressed by the Louisiana ~~concept~~ Supreme Court in this case, is even more indefinite:

> "* * *'disturb the peace' in Louisiana means '* * *to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet.'" 156 So. 2d at 455; Appendix at p. .

This is a quotation from an older case, Town of Ponchatoula v. Bates, 173 La. 824, 138 So. 851 (1932). Insofar as existing Louisiana notions of breach of the peace are embodied in the words of the statute, then, it is still further objectionable as invalid because those notions infringe freedom of speech.

Several times this Court has made clear that a generalized concept of breach of the peace is too vague to be applied to

constitutionally protected forms of expression. Cantwell v. Connecticut, 310 U.S. 296, 308 (1940); Edwards v. South Carolina, 372 U.S. 229; Henry v. City of Rock Hill, 376 U.S. 776 (1964). When the generalized concept is embodied in a statute, by that fact the statute is objectionable. The Louisiana breach of the peace statute purports to punish crowding in the streets and failing to disperse when ordered to do so, if these acts are done with the intent of provoking some ill-defined state of "disquiet", or under circumstances such that this ill-defined state may be occasioned (emphasis supplied). No congregation could take place in the street whereby the members could be sure that they were not running the risk of violating the state of mind contemplated by this statute. Congregations in the streets present such important occasions for free expression that this statute results in that "* * *continuous and pervasive restraint on all freedom of expression that might reasonably be regarded as within its purview", fatal to the statute in Thornhill, supra at 98.* The fact that it is an element of the offense under this statute that the accused has failed to disperse when ordered to do so, only serves to dramatize the possibility of "harsh and discriminatory enforcement by local prosecuting officials", which was a further failing

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* The Louisiana legislature obviously understood quite well that this statute would reach forms of expression rather than acts of violence, as it specifically exempted picketing by labor organizations from the effects of the statute. It was passed, moreover, after the present movement against segregation had begun, in the effort to stem the movement. See Garner V. Louisiana, 368 U.S. 157, 168 (1961).

of the statute in Thornhill, Ibid. Since a citizen need not obey every order of a policeman it is impossible to determine when the likelihood of that vague disquiet which constitutes the breach of the peace occurs; to obey every order of the police is to accede, literally, to the police state. To refuse to obey is a risk the citizen must assume; that risk must be diminished by reasonable clarity in the statute. Such is not true here. Unless one is given adequate notice where one falls afoul of the act, mere "breach of the peace" should fall for vagueness.

THE LAWS AND STATUTES INVOLVED IN THIS CASE WERE APPLIED SO AS TO DEPRIVE APPELLANT OF SPEECH PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A statute may not encroach upon this area of protected expression unless it is "* * * narrowly drawn so as to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State * * *" Cantwell v. Connecticut, 310 U.S. 296, 311 (1940). Though the Louisiana Supreme Court has held that the statutes involved in this case were so drawn and applied, this Court has final authority to determine whether, upon the facts as found by the Louisiana Court, a clear and present danger to a substantial interest of the state actually existed. Pennekamp v. Florida, 328 U.S. 331, 345 (1946); Edwards v. South Carolina, 372 U.S. 299 (1963). Such a determination will show that the Louisiana statutes were applied and interpreted in such a way as to deny due process of law to Mr. Cox.

Breach of the Peace

A long line of decisions by this court has established

that a general law punishing breach of the peace may not be used to punish the act of peaceful assembly in the streets, or other forms of peaceful expression. Cantwell v. Connecticut, 310 U.S. 296 (1940); Terminiello v. Chicago, 337 U.S. 1 (1949); Edwards v. South Carolina, 372 U.S. 229 (1963); Fields v. South Carolina, 375 U.S. 44 (1963); Henry v. City of Roch Hill, 376 U.S. 776 (1964).

In Edwards, this Court left open the possibility that street demonstrations might constitutionally be limited by a proper exercise of the police power:

> "We do not review in this case original convictions resulting from the even handed application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case." 372 U.S. at 236.

The Louisiana Supreme Court, 156 So. 2d at 454 (Appendix at p. 268) held that the breach of the peace statute was such a "precise and narrowly drawn" statute, had the Louisiana Supreme Court interpreted the statute narrowly, it would not have been valid as applied to Mr. Cox, because, as we have urged, the statute is unconstitutional on its face, and Mr. Cox was charged in the general terms of the statute; to have narrowed the meaning of the statute, at the appellate level would have been to convict him of a crime with which he was not charged.* In any case the Louisiana Supreme Court did

* The crime of which Rev. Cox was actually convicted,

not narrow the meaning of the statute so as to make it constitutional. In the effort to define the meaning of "breach of the peace," that court said:

> "* * *'disturb the peace' in Louisiana means '* * *to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet.'" 156 So. 2d 455; Appendix at p. .

But in Terminiello, supra, the Illinois court had defined breach of the peace in terms similar to those used here by the Louisiana Supreme Court.

> "Misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm." 337 U.S. at 3.

This court declared that the above standard was an infringement of freedom of speech in these words:

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky v. New Hampshire, supra is nevertheless protected against

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defined by the trial judge, was more extraordinary than the crime charged or the crime defined by the Louisiana Supreme Court. The trial judge held that a mass demonstration by colored people in the "predominantly white business district in the City of Baton Rouge" against segregation is "inherently" a breach of the peace. This ruling clearly makes criminal the peaceful expression o f unpopular views. (T. 545; Appendix at p. 112, 128)

> censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." 337 U.S. at 4.

The rule of the Louisiana Supreme Court has failed to restrict the meaning of breach of the peace to any crime which may constitutionally be forbidden under Terminiello. The rule quoted above from Terminiello has been held applicable to a non-violent street demonstration, Edwards v. South Carolina, 372 U.S. 229, 237 (1963), and thus the Louisiana breach of the peace statute does no more than punish "the peaceful expression of unpopular views." Ibid.

That it was unconstitutionally applied is shown by the fact that Mr. Cox spoke with the permission of the authorities until he referred to eating in segregated eating places. Although nothing more than this happened, the meeting was suddenly order to disperse, the tear gas followed, and Mr. Cox was arrested thereafter. It is not unreasonable to surmise that the halting of the demonstration and its dispersion were to prevent a situation protected by this Court in Garner v. Louisiana, 368 U.S. 157 (1961). Garner was decided by this Court but three days before the activity described herein and concerned Baton Rouge.

Obstructing Public Passages

The Louisiana statute L.S.A.-R.S. 14:100.1 punishes any person who "willfully obstructs" the normal use of the sidewalk or street by "impeding, hindering, stifling, retarding or restraining traffic therein or thereon",

The Supreme Court of Louisiana held, as in the case of the peace statute, that this statute was a "narrowly drawn regulatory statute," within the meaning of Edwards v. South Carolina, 372 U.S. 229 (1963). Though the defendant was charged in the terms of the statute, it might have been rendered constitutional in a proper case by a narrow definition of the phrase "willfully obstructs." But in this case no more "will" was alleged or proved than the will to congregate on the sidewalk for purposes of peaceful assembly. Since this non-violent demonstration against segregation was a form of expression protected under the Fourteenth Amendment, the Supreme Court of Louisiana in effect held that this protected expression was a "willful" obstruction of the sidewalk. So far from being a narrowly drawn regulatory statute, then, this statute literally punishes free speech on the streets, for the scienter necessary for a protest demonstration in the street or on the sidewalk. Any group congregated on the street, whether organized for peaceful purposes or not, may be arrested at any time under this statute.* See Holmes, J., dissenting, in Abrams v. United States, 250 U.S. 616, 626 (1919).

The situation in this case resembles that in Smith v. California, 361 U.S. 147 (1959). There the defendant was

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* In the case of the statute against obstructing the sidewalk, as in the case of the breach of the peace statute, the Louisiana legislature obviously understood that the statute was applicable to street demonstrations, as it specifically exempted picketing and other "concerted activity" by labor organizations from the statute.

convicted under a statute which punished solely the possession of obscene books, without requiring knowledge of their contents. This court reversed, holding that the statute, lacking an element of scienter, acted as a restraint of the free circulation of books. So here, the improper definition of "willful" permits the authorities to prevent all street demonstrations, and thus acts as a damper on such street demonstrations.

Demonstrating Near a Courthouse

Louisiana statute L.S.A.-R.S. 14:401 punished anyone who pickets, parades, or otherwise demonstrates in or near a courthouse of the State of Louisiana, "with the intent of interfering with, obstructing or impeding the administration of justice, or with the intent of influencing any judge, juror, witness or court officer in the discharge of his duty." The charge against Rev. Cox tracks the terms of the statute.

This Court has many times dealt with the constitutional problem presented in this case, admirably defined by the Louisiana Supreme Court in the decision below in these words:

> " * * *to arrive at a proper balance between basic conditions of our constitutional republic --freedom of utterance and peaceful assembly on the one hand, and the proper and impartial administration of justice on the other.***"
> 158 So.2d at 175; Appendix at p. 39a .

While the present case, that of a criminal sanction for a protest against an arrest, has not been presented to this Court, the same constitutional question has been presented in the cases concerning the sanction of contempt for protest against actions taken by courts in cases pending before them. In a long line of cases, this Court has held that the standard

to be applied in determining whether an expression of opinion upon a pending case may be punished by the state is whether that expression presents a clear and present danger to the administration of justice. Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331(1946); Bridges v. California, 314 U.S. 252 (1941). The standard applicable in such cases was clearly stated in Craig v. Harney, supra, and was reaffirmed in Wood v. Georgia, supra:

> "The fires which the expression kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." 331 U.S. at 376, 370 U.S. at 385.

While the Louisiana Supreme Court correctly apprehended the nature of the constitutional problem, it failed to apply in a speech case the stringent standard of clear and present danger required by this Court under the Fourteenth Amendment. It was content to say simple that it struck a balance between the two competing interests in favor of the administration of justice with little regard to the actual effect of the protest upon the administration of justice. 158 So.2d at 175; Appendix p. 39a.

No reason exists to apply a different standard to the case of a criminal penalty for a peaceful demonstration in front of a courthouse than the standard of clear and present danger applied in the contempt cases. No distinction should be made upon the supposed ground that a physical demonstration near a courthouse, however peaceful, presents a different or more immediate threat to the administration of justice than a publication, however vituperative.

When the demonstration takes place before the trial or arraignment of the prisoners whose arrest is protested, and when it is peaceful, it seems plain that it presents less of a threat than intemperate new articles written during the actual trial proceedings. It affords more opportunity for a peaceful reply, and that opportunity is at the root of the requirement that speech shall present a clear and present danger before it can be limited by the police power of a state. See Brandeis, J., concurring , in Whitney v. California, 274 U.S. 357, 375 (1927).

Nor should it be forgotten that the demonstration was held in this location with police permission. Not in defiance of it. Protesting arrests, singing, responses from the jail hardly constituted an impediment to justice since the jailees had not even been arraigned. The officials saw the size of the crowd, agreed to the meeting in the vicinity of the Court and jail, knew there was singing to be held and a sermon-like-talk to be given protesting the arrest of the people in jail. Except for a preacher's liberty in extended talk, this is what took place. It ill behoves the state to complain when it consented in advance.

In two of the chief cases of contempt by publication decided by this Court, a statement was made by a politically influential person or publication upon a matter actually in the process of decision by the court or its officers at the time. In Wood v. Georgia, supra, the defendant, a sheriff, disputed the reasons for calling a grand jury which was then

sitting. In Craig v. Harney, supra, a newspaper claimed that there had been a miscarriage of justice in a case for which a motion for a new trial was pending. These cases do not present a less immediate threat to the administration of justice than a peaceful demonstration against the arrest of persons not yet arraigned, and the standard applied to them should be applied here.

The statute under which Mr. Cox was convicted, moreover, is a criminal statute for the violation of which a severe penalty is exacted. Such a statute must give a clear standard of conduct, so that a citizen may know how to conduct himself so as to avoid punishment. It requires, if anything, a more exacting standard than a citation for contempt. A vague balance between the competing interests of the administration of justice and freedom of speech fails to supply such a standard. Herndon v. Lowry, 301 U.S. 242, 261 (1937).

The Louisiana Supreme Court would have us believe, by its characterization of the facts, that the demonstration was not peaceful, and was in fact a near riot, averted only by the action of the sheriff. 158 So.2d at 177-178 (appendix p.). Although the Louisiana Supreme Court applied the wrong standard, had its characterization of the facts been accurate, conceivably it might be argued that Mr. Cox presented a clear and present danger to the administration of justice such if some testimony were believed that jail was to be torn down.

To affirm on the basis of such an argument would be error; it would be equivalent to a conviction for a crime with which he was not charged. In any case, the characterization by the

Louisiana Supreme Court gives an erroneous impression of the facts, and an independent examination of the undisputed facts on the record, which this Court has the power to make, Pennekamp v. Florida, 328 U.S. 331, 345 (1946). Such examination will show that this was a peaceful demonstration; no clear and present danger to the administration of justice existed. (T. 35, 38, 90-92, 119, 123, 128, 168-9, 254, 257, 268, 270, 304, 376, 469, 514, 526, 529) The only violence were the acts of the police acting on superior orders.

In defining the phrase, "with the intent of interfering with, obstructing or impeding the administration of justice, or with the intent of influencing any judge, juror, witness or court officer in the discharge of his duty," the Louisiana Supreme Court again violates standards set forth in decisions of this Court. In a proper case, the meaning of this phrase might be sufficiently narrowed so as to cover only situations which present a clear and present danger to the administration of justice. See Holmes, J., dissenting in Abrams v. United States, 250 U.S. 616, 626 (1919). But here the only "intent" proved was the intent to have a demonstration across the street from the courthouse. The prisoners whose incarceration was being protested were not on trial, and their trial was not immediately in prospect (T. 201-203). All the witness both for the prosecution agreed that the purpose of the demonstration was peaceful (T. 29,37, 44, 158, 268, 299, 302, 363). No evidence was offered that the demonstration was intended to disrupt a trial or to intimidate anyone. Such evidence was in fact specifically

excluded by the trial court, and the ruling was affirmed by Louisiana Supreme Court. 158 So.2d at 176; Appendix p. . Both the District Court and the Louisiana Supreme Court found that the necessary intent was proved. In their opinion the intent necessary to violate the statute is no more than the intent necessary to carry out a form of peaceful expression protected under the Fourteenth Amendment, and hence the Statute, like the other Louisiana statutes involved here, "makes criminal the peaceful expression of unpopular views." Edwards v. South Carolina, 372 U.S. 229 (1963).

The Conviction of the Appellant Under the Louisiana Statute Punishing Demonstrations In or Near a Courthouse Deprived Him of Due Process of Law Because There Was No Evidence Upon Which the Conviction Could Be Based

The State of Louisiana failed at the trial of this case to present any evidence of intent to obstruct justice or to influence a court officer, evidence which is required by the Louisiana Statute punishing demonstrations in or near a courthouse. The only evidence of any sort presented against the Rev. Mr. Cox was the simple fact that he had led a demonstration in a manner prescribed by the police, across the street from a courthouse in protest against the arrest of prisoners then incarcerated in the jail attached to the courthouse. To treat this simple demonstration as evidence of such a danger or of intent to obstruct justice would infringe the right of freedo m of speech, supra p. 11-13, and thus Mr. Cox has been convicted without evidence of any crime which could constitutionally be proscribed by the legislature of Louisiana. Such a conviction constitutes a denial of due process of law under the Fourteenth

Amendment. Thompson v. Louisville, 362 U.S. 199 (1960), Garner v. Louisiana, supra. We must assume at the outset, however, that merely demonstrating to protest an arrest is not, "because it could not be," Thompson v. Louisville, 362 U.S. 199, 206 (1960), enough to show a clear and present danger to the administration of justice or of intent to obstruct justice or influence an officer of the court. Concepts applied by the Louisiana Supreme Court in analogous cases support this conclusion even though this statute has not previously been construed by the Supreme Court of Louisiana. In Graham v. Jones, 200 La. 137, 159, 171, 179, 183, 7 So.2d 688, 695, 699, 702, 703 (1942), the clear and present danger rule outlined by this Court in Bridges v. California, 314 U.S. 252 (1941) was applied to dismiss five convictions for contempt by publication. It was not applied in the present case of a demonstration outside a courthouse, which is constitutionally indistinguishable. In State v. Daniels, 236 La. 998, 109 So. 2d 896 (1959), a rigorous standard of intent was required for a statute similar to the one in this case. In that case the defendant, a convict who had struck a prison guard was charged with the crime of "Public Intimidation", being the use of force upon a public officer "with the intent to influence his conduct in relation to his position, employment, or duty." L.S.A.-R.S. 14:122. The Louisiana Supreme Court reversed the conviction on the ground that merely to have struck the guard was not enough to show the required intent. Here, however, the Louisiana Supreme Court held that a simple demonstration is enough to show intent to obstruct justice or influence a court

officer in the discharge of his duty. The Louisiana Supreme Court has failed in this case to apply the rigorous standards for clear and present danger and for intent which is has developed in closely similar cases, and it has thus affirmed a conviction based upon no evidence of acts which may be punished either under Louisiana law, or The United States Consttitution.

DISCRIMINATORY ADMINISTRATION OF THE LOUISIANA STATUES INVOLVED IN THIS CASE HAS DEPRIVED APPELLANT OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT

Passing from the construction of the statutes involved here to the manner of their administration, the facts in this case show that the statute was used by the state and city authorities, and by the District Court judge as well, to discriminate against active campaigning for integration of the races. The Louisiana Supreme Court has attempted to characterize this demonstration in such a way that it appears that a riot was "inevitable," and was averted only by timely action by the authorities. It refers to the sppech by Rev. Cox as "inflammatory" and to the demonstration as "fiery" and "frenzied." 158 So.2d at 177; Appendix at p. 452 . Nevertheless, all witnesses agreed and the state's witnesses and the Louisiana Supreme Court made much of the fact, that Mr. Cox was in complete control of the students at all times. (Ibid; T. 38, 107, 257, 318, 355)

The speech of Mr. Cox was not only not a violent statement (T. 158, 268) but according to all the witnesses, it actually recommended peaceful protest, turing the other cheek (T. 299, 363) and love for one's enemy (T. 254). In fact Sheriff Clemmons

specifically stated that the "inflamatory" element in Cox's speech was his advocacy of a sit-in at segregated lunch counters (T. 364). There was testimony that there was no threat of violence from the demonstrators; one witness for the state, in fact, felt that there was no fear of violence except from the white onlookers (T.128), and the police were well able to handle them (T. 329). The demonstration was carried on in the manner prescribed by the chief of police and the sheriff, and they were willing to permit and did permit the demonstration until Rev. Cox advocated a sit-in at lunch counters.* They felt that to be a breach of the peace (T. 364, 376) and the trial judge agreed with them when he said:

> "It must be recognized to be inherently dangerous and a breach of the peace to bring 1,500 people, colored people, down in the predominantly white business district in the City of Baton Rouge and congregate across the street from the Courthouse and sing songs as described to me by the defendant as the CORE national anthem carrying lines such as "black and white together" and to urge those 1,500 people to descend upon our lunch counters and sit there until they are served. That has to be an inherent breach of the peace, and our statute 14:103.1 has made it so." (T. 545 Appendix p. 11a,12a)

Thus all the authorities intended to permit the demonstration only so long as it did not openly oppose segregation.* Under

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* The Louisiana Supreme Court stated that Rev. Cox told the demonstrators, "Don't move," in reply to the order of the Sheriff to break up. 156 So.2d at 448. While it is disputed just what Rev. Cox did say, if anything, it is clear that the question whether he meant to obey the order or not is only relevant if the command was made in a valid manner. (T. 58, 82, 106, 275, 315, 354,373 521)

* Other actions of the Louisiana authorities arising out of this demonstration have reinforced the proof of this

Under the decisions of this Court, to permit a demonstration until it advocates ideas with which the authorities or the general public disagreee is a discriminatory application of the law which contributes both an interference with freedom of speech and a denial of equal protection of the laws under the Fourteenth Amendment. See Niemotko v. Maryland, 340 U.S. 268 (1951); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Terminiello v. Chicago, 337 U.S. 1 (1948).

A Trial in a Courtroom Segregated By Imposition of the State Constituted a Denial of Equal Protection of the Laws and Due Process of Law.

The trial judge stated that the courtroom was segregated for "the purpose of maintaining order in the courtroom;" he had ordered that half of the white section be turned over to Negroes. (T. 5-6, Appendix p.16a).* See Johnson v. Virginia, 373 U.S. 61 (1963). In Johnson the conviction of the defendant, a Negro, for contempt for sitting in the section reserved for whites in a Virginia courtroom, was reversed because such a conviction would be a denial of equal protection of the laws. Whether, as we urge, such unconstitutional state action improperly permeates the trial itself of Mr. Cox, a Negro defendant, in a case arising out of a

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* intent. In Lemmons v. CORE, an injunction was granted in the United States District Court for the Eastern District of Louisiana against the activities involved in this case, under the old Civil Rights Act, 42 USCA 1985. This injunction was vacated by the Fifth Circuit, 323 F. 2d 54 (1963) and this Court denied certiorari, 375 U.S. 992 (1964).

* The testimony of policemen who were appointed to count the

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The trial judge stated that the courtroom was segregated for "the purpose of maintaining order in the courtroom;" he had ordered that half of the white section be turned over to Negroes. (T. 5-6, Appendix p. 160).* See Johnson v. Virginia, 373 U.S. 61 (1963). In Johnson the conviction of the defendant, a Negro, for contempt for sitting in the section reserved for whites in a Virginia courtroom, was reversed because such a conviction would be a denial of equal protection of the laws. The only question now open is whether, as we urge, such unconstitutional state action improperly permeates the trial itself of Mr. Cox, a Negro defendant, in a case arising out of a

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* intent. In Commons v. CORE, an injunction was granted in the United States District Court for the Eastern District of Louisiana against the activities involved in this case, under the old Civil Rights Act. 42 USCA 1985. This injunction was vacated by the Fifth Circuit, 323 F.2d 54 (1963) and this Court denied certiorari, 375 U.S. 992 (1964).

* The testimony of policemen who were appointed to count the

civil rights demonstration in protest against segregation and against the arrest of others who had protested against segregation is at issue in the case at bar. Answering this question squarely in the negative, the Louisiana Supreme Court stated:

> "In the case before us, there is no charge against the defendant for having violated the court-imposed seating arrangement and none of the parties upon whom the segregation was imposed are before this court in this case. Hence the Johnson case is not authority for reversing this conviction. It has not been made to appear that the segregation resulted in a miscarriage of justice to this defendant. L.S.A.-R.S. 15:557. If it were otherwise, it would result that every Negro convicted in that court in the past would be entitled to have his conviction set aside." (56 So.2d at 456; Appendix p. 32a)

Nevertheless, the trial of Mr. Cox resulted in a denial of equal protection of the laws and due process and "a miscarriage of justice."

Even though discrimination is not specifically directed toward the person being tried, this Court has held that discrimination in the administration of justice is a denial of equal protection of the laws. Racial discrimination in the selection of the grand jury by which a Negro is indicted is a denial of equal protection of the laws, regardless of the fairness with which the trial jury may have been chosen. Eubanks v. Louisiana,

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> the number of whites and Negroes inside and outside the courtroom indicated that there were forty-two seats "reserved" for whites, of which eight were filled on one occasion and fourteen on another. In the meantime there were counted waiting in the hallways eight-eight Negroes at one time, and two hundred and fifty at another (T. 340-344).

356 U.S. 584 (1958). This decision is not made upon a direct showing that injustice was done to the Negro accused in the particular case, but becuase the Fourteenth Amendment is intended to prevent any state from creating, in the words of Mr. Justice Strong:

> "* * * legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

The trial of a Negro in a segregated courtroom is un constitutional for similar reasons. By the very conduct of the proceedings, the defendant and the society around him are reminded of his inferior status. Over a range of cases, moreover, more Negro defendants will be convicted under a system of segregation than without it. Racial segregation exists to reinforce prejudice against Negroes and to maintain their lower status. Conversely, studies have shown that integrated contact between the races produces more friendly relations and a change in attitude. See. e.g. Wilner, Walkley & Cook, Human Relations in Interracial Housing III (1955). It is the very nature of prejudice to prevent an observed from making a fair appraisal of the facts. Racial prejudice makes it difficult for an individual even to follow a train of reasoning about Negroes, let alone to determine the facts. Allport, The Nature of Prejudice, 168 (1954 Ed.)*

Segregation affects not only the preceptions and reasoning of white witnesses, and the deliberations of a white trier of fact, but it affects Negro witnesses equally if not more. In a segregated community Negroes often find it inadvisable to

* Two parallel syllogisms, both fallacious, and both

tell the truth to white people, to the point where such evasion becomes a habitual form of "accomodation" to segregated society. See. Dollard, Caste and Class in a Southern Town 259 (1937 Ed.); Hyman, Interviewing in Social Research 159 ff. (1954). **

Segregation produces a situation in which it is difficult for witnesses, both Negro and white, to testify accurately to the facts regarding Negro defendants, and it is difficult for the trier of fact fairly to weigh the evidence in such cases. Trials under such circumstances must necessarily produce different results, over the long run, than trials free of prejudice. The effects of segregation in the courtroom cannot be clearly separated from the effects of segregation elsewhere in the community. The great difference is that the trial court has no control over segregation elsewhere in the community, but it does over segregation in the courtroom. It is important, moreover, that a court of law should give notice that it is conducted without prejudice, even when, or rather especially when, the community is prejudiced. The moral effect of integration in the courtoom can be very great, and it may contribute a great deal to the creation of an atmosphere

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* involving statements about Negroes, were tested. Prejudiced individuals indentified one as valid and the other as invalid.

** Study showing that a large number of Negroes in Memphis, Tennessee, gave substantially different answers, on matters of fact as well as of opinion, to Negro and to White interviewers.

where fair perception, veracity, and free deliberation can prevail. It is absurd to say that segregation in the courtroom has no effect on the protection afforded a Negro defendant by a court. It has obvious effects, which create a denial of equal protection of the laws, and which require reversal of the conviction of a Negro defendant. It is apparent that sanctions other than the reversal of convictions have failed to end segregation in the courtroom, and this action therefore becomes the only effective alternative. See Mapp v. Ohio, 367 U.S. 643 (1961).

The Reverend Mr. Cox was vigorously attempting to eliminate the discrimination based upon such prejudice.

The considerations outlined above, showing that trial of a Negro defendant in a segregated courtroom is a denial of equal protection of the laws, apply a fortiori to a case where, as here, the defendant is also being tried for engaging in a protest against segregation. All the witnesses and the trier of fact will tend to have reactions conditioned by their prejudices and fears, which will be reinforced by segregation. In a segregated courtroom the trial of Mr. Cox must have been a denial of a fair and impartial tribunal. When the court itself expresses it own built-in prejudice as to the status of Negroes, no fair trial can result. In this case the judge had to make a number of decisions about the effect of a protest demonstration upon the community. He had to decide, for example, whether the demonstration was a "breach of the peace" and whether it presented a clear and present danger to a substantial interest of the state. These are questions of mixed law and fact, which

leave a large area of discretion for the judge; he had to decide whether the protest actually attacks the fabric of society and presents a danger of disorder. Surely he is disqualified from making that decision when he discloses that he both favors and administers the system against which the protest is directed. The judge betrayed his opinion about the effects of the demonstration when he said that the courtroom was segregated "in the purpose of maintaining order" (T. 6; Appendix p. 162); more sharply such prejudice was illustrated when the Court indicated that the demonstration of Negroes against segregation in downtown Baton Rouge was an "inherent breach of the peace" (T. 545; Appendix p. 11a, 128). Whether advocacy of integration as Cox preached, would lead to disorder, was preclosed to him, just as it was preclosed by his automatic maintenance of segragation in Court. Were Cox successful in his preaching it would affect, not only the restaurants in Baton Rouge, but the very Courtroom in which this Judge sat.

Segregation has created a special pattern of prejudice against a person such as Mr. Cox, who protests against it, and the judge, as trier of fact, by his administration of a segregated courtroom, has shown that he participates in the prejudice. The judge has demonstrated that he is prejudiced about a central issue in this case, and thus Rev. Cox has been denied a fair and impartial tribunal. See In Re Murchison, 349 U.S. 133 (1955).

The segregation of the courtroom, furthermore, has denied the Rev. Mr. Cox a public trial, within the meaning of the Sixth Amendment. The requirement of a public trial is applicable to trials in state courts under the due process clause of the

Fourteenth Amendment, Re Oliver, 333 U S. 257 (1948). Two of the bases for the requirement of a public trial, as outlined by Dean Wigmore, are to discover new witnesses and make existing witnesses disinclined to falsify. Wigmore, Evidence, Section 1834 (1940 Ed.). These two elements of the requirement have been infringed in this case, where the officers who made a count of the persons present, inside and outside the courtroom, found that colored people were waiting to get in, while seats were empty in the courtroom. (T. 340-341, in the Appendix at pp. 77a, 78a) To exclude them in a discriminatory way was to deny the petitioner the essential elements of a public trial. Cf. United States v. Kobli, 172 F.2d 919 (3 Cir 1949).

A trial, in a courtroom segregated by the act of the judge, denied Mr. Cox equal protection of the laws: more than that, it denied him the elements of a fair trial; further it denied him a public trial as required by the Constitution.

Conclusion

For the foregoing reasons it is respectfully submitted that the judgments of the Louisiana Supreme Court should be reversed.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

- x

B. ELTON COX, :

Appellant, :

-against- : Nos. 24 and 49

STATE OF LOUISIANA. :

- x

ERRATA IN BRIEF OF APPELLANT

The brief of appellant, as printed contains the following errata:

p. ii, Fifth line from bottom:

Clemmons v. CORE, 323 F.2d 54 (5 Cir. 1963)

p. iii, Last two lines:

Wilner, Walkley & Cook, Human Relations in Interracial Housing, 111 (1955)

p. 9, Second paragraph line 6:

stitutes a breach of the peace, said the Louisiana Court. A

p. 11, Second paragraph, next to last line:

775 (1962). As here, police protection was ample, and there was little

p. 12, Second paragraph, line 3:

As this Court said in Terminiello v. Chicago, 337 U.S. 1, 4 (1948):

p. 13, First paragraph, line 9:

statute is so vague and indefinite that it permits the punishment

p. 16, Second paragraph, line 1:

A statute may not encroach upon the area of protected

p. 17, Seventh line from bottom:

was such a "precise and narrowly drawn" statute. Had the

p. 20, line 2:

the breach of the peace statute, that this statute was a "narrowly drawn

p. 21, Line 1:

The Louisiana statute, L.S.A. - R.S. 14:401 punishes anyone

p. 22, Seventh line from bottom:

of a threat than intemperate news articles written during

p. 23, Line 2:

held in this location with police permission, not in defi-

p. 24, Lines 9-10:

ministration of justice.

p. 24, Second paragraph, line 8:

U.S. 331, 345 (1946), will show that

p. 24, second paragraph, line 11:

514, 526, 529). The only violence was the act of po-

p. 27, Second paragraph, line 3:

case show that the statutes were used by the state and city

p. 28, Second footnote, line 2:

demonstrations have reinforced the proof of this intent. In Clem-

p. 31, first paragraph, line 11:

ley & Cook, Human Relations in Interracial Housing 111

p. 31, Last paragraph, line 1:

Segregation affects not only the perceptions and reason -

p. 32, Last three lines

See Mapp v. Ohio, 367 U.S. 643 (1961)

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Statutes Involved

LOUISIANA STATUTES ANNOTATED—R. S. 14:100.1

§100.1 OBSTRUCTING PUBLIC PASSAGES

No person shall wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, water craft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.

Providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions.

Whoever violates the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned for not more than six months, or both fined and imprisoned.

This section shall not be applicable to the erection or construction of any barricades or other forms of obstructions as a safety measure in connection with construction, excavation, maintenance, repair, replacement or other work, in or adjacent to any public sidewalk, street, highway, bridge, alley, road, or other passageway, nor to the placing of barricades or other forms of obstruction by governmental authorities, or any officer or agent thereof, in the proper performance of duties. Added Acts 1960, No. 80, §1.

Emergency. Effective June 22, 1960.

Statutes Involved

LOUISIANA STATUTES ANNOTATED—R. S. 14:103.1

§103.1 DISTURBING THE PEACE

A. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby:

(1) crowds or congregates with others, providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions, in or upon a shore protection structure or structures, or a public street or public highway, or upon a public sidewalk, or any other public place or building or in any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, motion picture theatre, drive-in, beauty parlor, swimming pool area, or any sports or recreational area or place, or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual, or a corporation, or a partnership or an association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, or by any law enforcement officer of the state of Louisiana, or any other authorized person, or

his opinion about the effects of the demonstration when he said ~~that the courtroom was segregated "in the purpose of maintaining order" (T. 6; Appendix p.), and later~~ that the demonstration of Negroes against segregation in downtown Baton Rouge was an "inherent breach of the peace" (T. 545; Appendix p.). He had no way, moreover, to determine whether integration or advocacy of integration would lead to disorder, because he had already refused to try its effects in the courtroom. He said that the courtroom was segregat "in the purpose of maintaining order" (T. 6; Appendix p.). In his per curiam opinion on certai motions, he added that the courtroom was segregated "to preserve order (1R48; 5 Appendix p.) This case presents issues analogous to those raised in Irvin v. Dowd, 366 U.S. 717 (1961). In that case Irvin obtained from this Court a reversal of conviction upon a writ of habeas corpus, because prejudice created against him by publicity made it impossible for him to get a fair trial in the county, a change of venue was denied, and certain

Statutes Involved

LOUISIANA STATUTES ANNOTATED—R. S. 14.401

"§401. DEMONSTRATIONS IN OR NEAR BUILDING HOUSING A COURT OR OCCUPIED AS RESIDENCE BY JUDGE, JUROR, WITNESS OR COURT OFFICER

"Whoever, with the intent of interfering with, obstructing or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty pickets or parades in or near a building housing a court of the State of Louisiana, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any soundtruck or similar device or resorts to any other demonstration in or near such building or residence, shall be fined not more than five thousand dollars or imprisoned not more than one year, or both.

"Nothing in this section shall interfere with or prevent the exercise by any court of the State of Louisiana of its power to punish for contempt. Acts 1950, No. 177, §§ 1, 2."

False Informations

NO 42,201
CM

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State of Louisiana — Parish of East Baton Rouge

NINETEENTH JUDICIAL DISTRICT COURT

SARGENT PITCHER JR. ~~Assistant~~ District Attorney of the Nineteenth Judicial District of the State of Louisiana, who, in name and by the authority of said State, prosecutes in this behalf, in proper person, comes into the Nineteenth Judicial District Court of the State of Louisiana, in the Parish of East Baton Rouge, and gives the said Court here to understand and be informed that

B. ELTON COX

late of the Parish of East Baton Rouge, on the Fifteenth (15th) day of December in the year of our Lord One Thousand Nine Hundred and Sixty-one (1961) with force of arms, in the Parish of East Baton Rouge, aforesaid, and within the jurisdiction of the Nineteenth Judicial District Court of Louisiana in and for the Parish of East Baton Rouge, then and there being, ~~feloniously and~~ unlawfully violated the provisions of R. S. 14:401, in that he, with the intent of interfering with, obstructing, and impeding the administration of Justice, and with the intent of influencing a Judge, witnesses and Court Officers in the discharge of their duty, did picket, parade and engage in a demonstration in fromt of and near the East Baton Rouge Parish Courthouse, a building housing a Court of the State of Louisiana and occupied and used by such Judges, witnesses and Court Officers,

contrary to the form of the Statutes of the State of Louisiana, in such case made and provided, in contempt of the authority of said State, and against the peace and dignity of the same.

~~Assistant~~ District Attorney, Nineteenth Judicial District of Louisiana

Form 2
KENNEDY PRINT SHOP, INC.

62 CM

State of Louisiana -- Parish of East Baton Rouge

NINETEENTH JUDICIAL DISTRICT COURT

SARGENT PITCHER JR. Assistant District Attorney of the Nineteenth Judicial District of the State of Louisiana, who, in name and by the authority of said State, prosecutes in this behalf, in proper person, comes into the Nineteenth Judicial District Court of the State of Louisiana, in the Parish of East Baton Rouge, and gives the said Court here to understand and be informed that

B. ELTON COX

late of the Parish of East Baton Rouge, on the Fifteenth (15th) day of December in the year of our Lord One Thousand Nine Hundred and Sixty-one (1961) with force of arms, in the Parish of East Baton Rouge, aforesaid, and within the jurisdiction of the Nineteenth Judicial District Court of Louisiana in and for the Parish of East Baton Rouge, then and there being did unlawfully ~~violated R. S. 14:103.1, by congregating with others in and upon a public~~ violate R.S. 14:103.1, by congregating with others in and upon a public street and upon public sidewalks in front of the Courthouse in the Parish of East Baton Rouge, a public building, and in and around certain entrances of places of business and failed and refused to disperse and move on when ordered to do so by the Sheriff of East Baton Rouge, a person duly authorized to enforce the laws of this State, that a breach of the peace might ensue

contrary to the form of the Statutes of the State of Louisiana, in such case made and provided, in contempt of the authority of said State, and against the peace and dignity of the same.

Assistant District Attorney, Nineteenth Judicial District of Louisiana

Form 2

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(2) insults or makes rude or obscene remarks or gestures, or uses profane language, or physical acts, or indecent proposals to or toward another or others, or disturbs or obstructs or interferes with another or others, or

(3) while in or on any public bus, taxicab, boat, ferry or other water craft or other vehicle engaged in transporting members of the public for a fare or charge, causes a disturbance or does or says, respectively, any of the matters or things mentioned in sub-section (2) supra, to, toward, or in the presence of any other passenger on said vehicle, or any person outside of said vehicle or in the process of boarding or departing from said vehicle, or any employee engaged in and about the operation of such vehicle, or

(4) refuses to leave the premises of another when requested so to do by any owner, lessee, or any employee thereof, shall be guilty of disturbing the peace.

B. Whoever commits the crime of disturbing the peace as defined herein shall be punished by a fine of not more than two hundred dollars, or imprisonment in the parish jail for not more than four months, or by both such fine and imprisonment. Added Acts 1960, No. 69, §1.

Take in loose page 1a

Opinion of Hon. Fred A. Blanche, Judge of the Nineteenth Judicial District of East Baton Rouge, Louisiana

(from Transcript of Trial)

(540)

REASONS FOR JUDGMENT

By the Court:

Before rendering a verdict, I want to caution the members present in court that I expect complete orderliness to be carried out just as it has been while arguments of counsel were going on and just like it has been throughout this entire trial.

First of all, the Court would like to thank both counsel for their respect to the Court and toward each other. The Court takes cognizance of the fact that during a heated trial sometimes both witnesses and counsel and the Court have heated exchanges, and I think that in a case of the character of this case involving demonstrators or rather the leader of a demonstration protesting segregation in this community, it is particularly admirable. It is admirable because, as counsel pointed out in argument, we have lived here peacefully in this community under a system of segregation from time immemorial and then all of a sudden in one day we have a protest of 1,500 people strong in the City of Baton Rouge and against what has been a custom for so long.

I want to dictate into the record exactly all of my reasons for judgment because much of the evidence adduced by both the prosecution and by the defense was based on hearsay, but I, as the judge of this court, am able to

(541)

discriminate as to what is hearsay and what is not hearsay and what, in my opinion, is valid evidence.

Opinion of Hon. Fred A. Blanche, Judge of the Nineteenth Judicial District of East Baton Rouge, Louisiana

With regard to the charge in 42,199, the Court finds B. Elton Cox not guilty. (I promise you, if I hear any further demonstration, I will empty the courtroom.) I find B. Elton Cox not guilty because he is charged under our attempt statute which is 14:26, and I cannot find him guilty of this charge because it is my opinion that the law of this state is that there must be some overt act perpetrated in violation of the statute which he is charged with, namely, 14:100.1 and 14:100.3, and the only evidence to prove this was that the defendant told the demonstrators to go down to the lunch counter and stay there. Our law, however, I think is that there must have been some overt act on the part of those with whom he was in conspiracy to violate that law, and I think probably had it not been for the police breaking up the demonstration that he would have been found guilty of this charge. I do think that the police broke it up before any one of them could make one move in that direction.

Now, with regard to the charge that is contained in bill No. 42,200. In bill No. 42,200 he is charged:

> ". . . in that he did wilfully obstruct the free, convenient and normal use of a public sidewalk within the City of Baton Rouge thereby impeding, hindering and restraining passage thereon."

(542)

This Court takes cognizance of the fact that there has been testimony of competent witnesses from our police force who have had experience in estimating crowds; I have seen the pictures taken by Mr. Bob Durham which reflect to me that the sidewalk was effectively blocked. To place

some 1,500 people—The evidence was that the people did not block the service station area which is shown on a map of E. R. Nilson Map Service, but the testimony of both the police and disinterested witnesses not in anywise connected with law enforcement as well as the photographs taken by the photographer in the news film show that in the area ten feet wide according to this map and some 256 feet long that there were contained by the minimum estimate some 1,500 people; and if 1,500 people can congregate in 256 feet without blocking it, then the Court would have to be blind to physical facts. So, for that reason, as a consequence of what I saw on the film and from what I heard, I say and hold that this sidewalk on the west side of the Courthouse was obstructed for the convenient and normal use as a public sidewalk in the City of Baton Rouge and that it did impede and hinder and restrain passage thereon in the direct words of the statute that this bill of information which I read from tracks the statute. I find the defendant guilty of that charge.

With regard to No. 42,202 wherein he is charged with violating R. S. 14:103.1, R. S. 14:103.1 says that:

(543)

> "Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of peace may be occasioned thereby: (1) crowds or congregates with others . . . upon a public sidewalk, (and, of course, I have omitted the parts of the statute which are not pertinent) or any other public place or building (which is what he is charged with in the bill of information) . . . and who fails or

Opinion of Hon. Fred A. Blanche, Judge of the Nineteenth Judicial District of East Baton Rouge, Louisiana

> refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, or by any law enforcement officer of the State of Louisiana . . ."

commits the crime of disturbing the peace. With regard to this statute, an attack has been made on this statute on the grounds that it is unconstitutional because it seeks to prohibit or punish the defendant by virtue of a criminal statute when he has a right as a citizen to peacefully protest against the segregation laws of the State of Louisiana or to protest against racial segregation and discrimination.

First of all, let me say that this Court respects the right of freedom of speech. It respects the right to picket, but even the right to picket and the right of freedom of speech is subject to limitation. Restrictions have been placed on (544)

the right to picket by the Federal Government and elsewhere under our state law involving labor activities with regard to their right to picket. In any event, picketing is said to be lawful when it is peaceful because it represents freedom of speech. Now, the right to protest is lawful, and the right to protest is lawful if it is conducted in a lawful manner. Our courts have held that picketing is unlawful when it is mass picketing, and if this protesting is a form of freedom of speech, I say it is unlawful when it is done en masse by some 1,500 people of the colored race parading on the streets of Baton Rouge and congregating on the sidewalk in violation of this statute.

Opinion of Hon. Fred A. Blanche, Judge of the Nineteenth Judicial District of East Baton Rouge, Louisiana

If this statute is a "segregation statute," it should be one of the segregation statutes that should be upheld by every court in this land. It should be upheld because it undertakes to understand the mood and the nature of our people, both colored and white. It recognizes, as this Court recognizes, that in the City of Baton Rouge there is racial tension. It recognizes, as our legislators must have recognized, that there is racial tension within the State of Louisiana; and the intent of the statute is to give the police the power to punish or disband or break up mass demonstrations, especially where they might involve racial overtones. It doesn't take a smart judge or it doesn't take any evidence to be presented to this Court to know that since
(545)
the advent or since the decision of the United States Supreme Court (I think the case was Brown v. Topeka), that racial tension has mounted in the south, and understandably so, because after living under that system for hundreds and hundreds of years the change didn't just occur overnight. They recognize the basic human instinct that there would be resentment toward integration in the South, and I think our Legislature wisely took steps to have a statute on the books that would give law enforcement authorities the power to make it unlawful for anyone to demonstrate in such a manner so as to effectively block the sidewalk, which was done in this case. It should be inherently dangerous and a breach of the peace, recognizing racial tension as we have it in the south. It must be recognized to be inherently dangerous and a breach of the peace to bring 1,500 people, colored people, down in the

Opinion of District Court

Decision

(545)

o o o

With regard to bill No. 42,201, that is where B. Elton Cox is charged that he:

(546)

> ". . . unlawfully violated the provisions of R. S. 14:401, in that he, with the intent of interfering with, obstructing, and impeding the administration of Justice, and with the intent of influencing a Judge, witnesses and Court Officers in the discharge of their duty, did picket, parade and engage in a demonstration in front of and near the East Baton Rouge Parish Courthouse, a building housing a Court of the State of Louisiana and occupied and used by such Judges, witnesses and Court Officers."

Mr. Jones has filed into the record this map which shows that the group which Reverend Cox led to the west side of America Street could not have been more than 103 feet from the steps of the courthouse to where his group was congregated directly across the street. That would be 103 feet and the Court feels that that would qualify under the definition of being near. With regard to the evidence as to whether or not he was the leader of the said group, he was the one who dealt with the officers, he is the Field Secretary of the Congress of Racial Equality and the evidence, not only from his own testimony but from Ronnie Moore and others of his affiliation with CORE, leaves no doubt in this Court's mind that he was the leader of the group

across the street from the Courthouse. That is also accurately reflected in the films. The real question, though, in
(547)
that statute is with regard to the intent. The bill charges "... in that he, with the intent of interfering with, obstructing, and impeding the administration of Justice, and with the intent of influencing a Judge . . . ." I asked many questions of the accused and others such as Ronnie Moore as to just what did they propose to accomplish by congregating on the other side of the Courthouse, on the street on the other side of the Courthouse, singing these songs and protesting the "illegal incarceration" of their fellow members in the East Baton Rouge Parish jail.

The defense is that they had no intent to influence anyone, that this is just mere freedom of speech, that this is their right to protest out against anything which they happen to think is a social wrong and a social injustice. Of course, even our Federal Government has recognized the danger of freedom of speech expressed in this manner and has made it a violation of Federal law to picket and parade and engage in a demonstration in front of or around a Federal Court. Our state statute, which was copied after the Federal statute, was enacted even before the Supreme Court issued its initial school integration decision. This statute was on our books in the year 1950, long before the school integration decision, and was copied after the Federal statute.

Now, what do people do when they come and parade in
(548)
front of the Courthouse? I was not a witness to the demonstration myself personally, but I was present in the Court-

house shortly before it occurred. I was present in this Courthouse when evidently the police had gotten notice that some demonstration was impending, and my reaction was to get away from it as fast as I could. If you asked me what I was afraid of, I can tell you best by saying that having lived here in the South all of my life and being present around a demonstration of some 1,500 colored people who are protesting against racial discrimination and being a part of this community and living in this community where I know that especially of late that there is tension between the races, I felt that it would be unpleasant in some way or it would be some unpleasant thing to me to see; and because I know that there is tension between the races, I think I felt apprehensive that trouble or violence could erupt from such a situation. That is what I felt in my heart and that is why I left, because I didn't want to be anywhere near or in connection with it. I can say that it had influence on me. I can say that it made me fearful. Perhaps a better word would be "apprehensive," that there might be some racial violence. I can say as a judge that that is the way I felt With all my heart I can say that. Then when I try to think of, if you want to protest, why protest around the Courthouse, I get the feeling that there is some subtle intimidation of me or of anyone of us who is responsible for upholding the laws of the State
(549)
of Louisiana and maintaining, according to certain of our laws, segregation.

For example, Mr. Jones, who has practiced law in my court for some time with success, sometimes without, well

knows that Division "B" and every other division up here has been segregated. He well knows that, and I think he also knows, too, that if I would just say to everybody white and colored, "Let's just all mix up together in the courtroom at the same time," I think that it would be calculated to cause disorder in court. Maybe some time that situation might not be, but he ought to know and I do know right now that it would cause disorder. When he makes such a statement in the presence of a courtroom almost entirely filled with colored persons and knowing the situation as he does, I think this is some intimidation of me. The Court gave half the section that was usually reserved for whites to the colored spectators in addition to the half that they have always customarily had, and he intimates that the Court is being unfair by allowing this trial to go on in a segregated courtroom. Yes, I feel that there is some intimidation of me, especially when there are some 250 colored people standing in the halls outside waiting to get in and overcrowd this courtroom when there is no place for them to sit if I gave them the whole courtroom.

In any event, I felt as a judge the subtle intimidation, (550)

and while I know that he protests bitterly against it as merely a freedom of his speech, I am sure when our Federal Government devised this statute which our state has copied that perhaps the Communists must have felt the same way.

Therefore, the Court finds the defendant B. Elton Cox guilty of bill No. 42,201.

* * *

Opinion of Hon. Fred A. Blanche, Judge of the Nineteenth Judicial District of East Baton Rouge, Louisiana

predominantly white business district in the City of Baton Rouge and congregate across the street from the courthouse and sing songs as described to me by the defendant as the CORE national anthem carrying lines such as "black and white together" and to urge those 1,500 people to descend upon our lunch counters and sit there until they are served. That has to be an inherent breach of the peace, and our statute 14:103.1 has made it so.

Take in Loose p-20

Opinion of the Supreme Court of Louisiana

(1) in case No. 24 in this Court

SUPREME COURT OF LOUISIANA

No. 46,395

STATE OF LOUISIANA

versus

B. ELTON COX

APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
FOR THE PARISH OF EAST BATON ROUGE
HONORABLE FRED A. BLANCHE, JR., JUDGE

No. 46,396

STATE OF LOUISIANA

versus

B. ELTON COX

IN RE: B. ELTON COX APPLYING FOR WRITS OF CERTIORARI, MANDAMUS AND PROHIBITION TO THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

SUMMERS, Justice.

In these consolidated cases[1] defendant, B. Elton Cox, was charged by the district attorney of East Baton Rouge

[1] There were four bills of information filed against the accused that were consolidated for trial below. On one charge involving criminal conspiracy the accused was acquitted; another charge of obstructing justice is on appeal in this court and is separately docketed; the remaining two of the four charges are the subject of this opinion.

Parish with obstructing public passages as defined and prohibited by R. S. 14:100.1. He was convicted, sentenced (2)
to pay a fine of $500 and to be imprisoned in the parish jail for a period of five months, and, in default of the payment of the fine, to be imprisoned an additional five months. An appeal was taken in this case and is docketed in this court under Number 46,395.

By separate bill of information Cox was charged with disturbing the peace as defined and prohibited by R. S. 14:103.1. He was convicted, sentenced to pay a fine of $200 and to imprisonment in the parish jail for a period of four months, and, in default of the payment of the fine, to be confined in the parish jail for four months. The accused having no right of appeal in this latter case, made application to this court for writ of certiorari, mandamus and prohibition which we granted under our supervisory powers to review the correctness of certain actions below.[2]

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[2] In both of these cases the accused was incarcerated in the parish prison pursuant to the sentences which were decreed to run consecutively. But, originally, because of the trial court's failure to allow proper delay after verdict and before sentence as required by R. S. 15:521 we granted writs of habeas corpus in both of these cases. In our review of the trial court's action (See State v. Clemmons, 243 La. 264, 142 So. 2d 794 (1962)) the writs were made peremptory, the sentences were annulled and set aside and the accused was ordered released on bail until such time as legal sentences were imposed and the accused was afforded an opportunity to take the procedural steps necessary to bring the matter before this court either on appeal or by writ application.

When the cases were again resumed below, the accused filed certain motions, perfected bills of exceptions and, in due time, was again sentenced as outlined in the body of this opinion.

The bill of information in No. 46,395 charges that defendant "did violate the provisions of R. S. 14:100.1 in that he did wilfully obstruct the free, convenient and normal use of a public sidewalk within the City of Baton Rouge, (3)
thereby impeding, hindering and restraining passage thereon."

The pertinent parts of the statute relied upon by the State provide:

> "No person shall wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, water craft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.
>
> Providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions. * * *"
> R. S. 14:100.1

The bill of information in No. 46,396 charges that defendant "violated R. S. 14:103.1, * * * in that he did under circumstances such that a breach of the peace could be occasioned congregate with others in and upon a public street and upon public sidewalks in front of the Courthouse

in the Parish of East Baton Rouge, a public building, and in and around certain entrances of places of business and failed and refused to disperse and move on when ordered (4)
to do so by the Sheriff of East Baton Rouge, a person duly authorized to enforce the laws of this State."

The pertinent portion of the statute upon which this charge is based provides:

> "A. Whoever with intent to provoke a breach of the peace or under circumstances such that a breach of the peace may be occasioned thereby: (1) crowds or congregates with others, providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions, in or upon a shore protection structure or structures, or a public street or public highway, or upon a public sidewalk, or any other public place or building, or in any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, motion picture theatre, drive-in, beauty parlor, swimming pool area, or any sports or recreational area or place, or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual, or a corporation, or a partnership or an

association, and who fails or refuses to disperse and move on, or disperse or move on, when ordered so

(5)

to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, or by any law enforcement officer of the state of Louisiana, or any other authorized person * * * shall be guilty of disturbing the peace * * *."

The defendant filed motions to quash and motions for bills of particulars to each of these bills of information prior to trial. These motions were overruled and the cases proceeded to trial, where these facts were established.

On the morning of December 15, 1961, the defendant, Cox, as the unquestioned leader, with a crowd of Negroes variously estimated at 1,500 to 3,800 (we think 2,000 persons is a fair conclusion to be derived from the evidence) assembled in the heart of Baton Rouge in the vicinity of the Old State Capitol Building, a short distance from the parish courthouse. Shortly before noon, Cox led these demonstrators in an orderly fashion to the vicinity of the parish courthouse, where the sheriff, chief of police and a substantial contingent of approximately eighty law enforcement officials had gathered in preparation for the march upon the courthouse. Twenty-three Negros had been arrested the day before for demonstrations in Baton Rouge and they were at that time imprisoned in the parish jail located in the upper floor of the courthouse building.

Arriving near the courthouse in the vanguard of the marchers, Cox was confronted by the sheriff and chief of

police and was asked what his intentions were. He announced to them that the marchers were demonstrating (6) against segregation and their activities would be confined to a few songs, a speech, and peaceful demonstrations, the whole of which would consume only a few minutes. The sheriff then advised Cox to confine his demonstration to the time mentioned and no more.

The marchers then occupied the sidewalk across the street from the western entrance of the courthouse. The testimony and motion pictures in evidence unmistakably establish the fact that the marchers completely occupied the entire sidewalk for the greatest portion of a block across from the courthouse in such a manner that no passage was possible thereon. All of the entrances to many offices facing that sidewalk were blocked, their occupants being unable to enter or leave. In the words of one witness the demonstrators were "tightly packed" along most of the sidewalk. Unmistakably, too, these activities resulted in an obstruction of the street separating the sidewalk occupied by the marchers and the courthouse. Because of this, it was necessary to reroute traffic away from that street. Meanwhile, several hundred white persons had gathered in front of the courthouse across the street from the demonstrators.

There were silent prayers and a display of signs, which the demonstrators had kept hidden in their clothing. These signs being the identical ones used by the demonstrators who had been arrested the day before. All of these activities took place under Cox's command and according to

instructions he issued during each phrase of the demonstration.

Cox then made a speech which was in effect "a protest against the illegal arrest of some of their members." He admonished the multitude of demonstrators to remain (7)
peaceful and generally built them up emotionally for further sit-in demonstrations which he instructed them to conduct at lunch counters in the business district of the city upon leaving the scene.

The crowd then sang songs, answered by the prisoners in the jailhouse, and this in turn evoked loud and frenzied outbursts and "wild yells" from the demonstrators assembled on the sidewalks.

Whereupon "grumbling" was heard among the white people, a feeling of "impending excitement" was apparent to all and a fear arose among those present that they were "about to have a riot." Several witnesses testified that in their lifetime no demonstration of this nature or scope had ever taken place in Baton Rouge. As one witness expressed it the crowd was "rumbling." In the large crowd the "tension was running high." Some of the witnesses felt the demonstrators were about to storm the courthouse to get the prisoners who had been arrested the day before.

At this time the prisoners in jail were "hollering", "screaming", "beating on bars", "beating on walls and so on" trying to attract the attention of the demonstrators across the street.

The sheriff, feeling that a riot was imminent, and fearing the crowd would get out of hand instructed Cox by means of a loudspeaker so that all present could hear to

"move on" and "break it up", that he had had his time. Cox then instructed the demonstrators by saying "Don't move" and by his actions and demeanor defied the sheriff's orders. The demonstrators and Cox stood immobile. They refused to move on.

(8)

The police then dispersed the crowd with tear gas and Cox was arrested the next day.

Four causes are assigned by the accused for setting aside the conviction below.

First, it is asserted that the specific laws under which he was charged, tried and convicted (R. S. 14:100.1 and R. S. 14:103.1) are unconstitutional in their application, for the conviction thereunder infringes upon the defendant's right of free speech protected by the First Amendment of the United States Constitution which the States cannot deny its citizens because of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

Second, the claim is made that these laws and the bills of information are too vague and general and hence violate the due process and equal protection clauses of the Fourteenth Amendment.

Third, it is contended that Cox's trial and conviction were violative of the Fourteenth Amendment for there was no evidence tending to prove the crime charged.

Fourth, it is contended that the segregated conditions in the courtroom during the trial denied Cox a fair trial in violation of the Sixth and Fourteenth Amendments.

Defendant's first contention is based upon the proposition that the statutes (R. S. 14:100.1 and R. S. 14:103.1)

prohibiting the obstructing of public passage and disturbing the peace, under which defendant was convicted, are unconstitutional in their application in this case. The defendant asserts that if those statutes are construed to
(9)
convict defendant for his action in obstructing the sidewalks while demonstrating against segregation it deprives him of the freedom of assembly and freedom of speech and the right to peacefully picket guaranteed by the First Amendment to the Constitution of the United States. Under the due process and equal protection of the laws clause of the Fourteenth Amendment, it is contended, the State of Louisiana must afford the right of freedom of speech to this defendant. Defendant relies upon the case of Thornhill v. Alabama, 310 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940), holding that peaceful picketing was within the liberties protected by the First and Fourteenth Amendments. The argument is advanced that such interest as the State of Louisiana has in protecting the public peace is not substantial enough to justify this prosecution which has the effect of denying to the accused the guarantees of freedom of speech and expression.

Thus we understand the contention to be that even though the statute might be constitutionally enforced under other circumstances, it cannot be invoked to punish this demonstration which the defendant asserts is no less an expression than is speech against segregation; and this freedom of expression, like freedom of speech, is protected by the First Amendment. Citing concurring opinion of Mr. Justice Harlan in Garner v. Louisiana, 368 U. S. 157, 82 Sup. Ct. 248, 7 L. Ed. 2d 207 (1961).

The United States Supreme Court has long ago announced that these First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States. Edwards v. South Carolina, 372 U. S. 229, 83 Sup. (10)
Ct. —, 9 L. Ed. 2d 697 (1963); Thornhill v. Alabama, supra; Cantwell v. Connecticut, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213 (1940); DeJonge v. Oregon, 299 U. S. 353, 57 Sup. Ct. 277, 81 L. Ed. 270 (1937); Stromberg v. California, 283 U. S. 359, 51 Sup. Ct. 532, 75 L. Ed. 1117 (1931); Whitney v. California, 274 U. S. 357, 47 Sup. Ct. 641, 71 L. Ed. 1095 (1927); Gitlow v. New York, 268 U. S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138 (1925).

But the right of freedom of speech is not absolute and a State may by general and non-discriminatory legislation, under its police power, regulate the exercise of that freedom. Cantwell v. Connecticut, supra.

Our inquiry, then, must be directed to the regulation of the constitutional guarantee and a careful consideration of whether that regulation is within the allowable area of state control. And so in this inquiry we must look to the conduct to be limited or proscribed.

The statutes in question do not come within the objection that they punish conduct which is so generalized as to be "not susceptible of exact definition" as was the case in Edwards v. South Carolina, supra. To the contrary, in each instance the proscribed conduct is precisely and narrowly defined for it is to "obstruct * * * any public sidewalk * * * by impeding, hindering, stifling, retarding or restraining traffic or passage thereon" in one instance which is proscribed and it is those who "under circumstances such that a breach of the peace may be occasioned

thereby: (1) crowds or congregates with others * * * in or upon * * * a public sidewalk'' who are guilty of disturbing (11)
the peace in the other instance. See also Garner v. Louisiana, 368 U. S. 147, 82 Sup. Ct. 248, 7 L. Ed. 2d 207 (1961), Town of Ponchatoula v. Bates, 173 La. 824, 138 So. 851 (1932).

Laws having the character of those under attack have been before the courts of last report in other States, and have been upheld as reasonable regulations in the exercise of police power. City of Tacoma v. Roe, 190 Wash. 444, 68 P. 2d 1028 (1937); State v. Sugarman, 126 Minn. 477, 148 N. W. 466, 52 L. R. A. (N. S.) 999 (1914); Benson v. City of Norfolk, 163 Va. 1037, 177 S. E. 222 (1934).

In the statutes under consideration there is no discrimination, but where labor picketing is concerned a clearly defined exclusion recognized in Thornhill v. Alabama, supra, is set forth.

In Edwards v. South Carolina, supra, the court announced that no infringement upon constitutional guarantees would be involved ''If, for example, petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public * * *'' And this is the precise nature of the regulation which these contested statutes invoke. The reasons which support such enactments are obvious and have been approved on many occasions. They are that:

> ''Municipal authorities, as trustees of the public, have the duty to keep their communities' streets open and available for movement of people and

property, the primary purpose to which streets are dedicated. So long as legislation to this end does

(12)

not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion." Schneider v. State, 308 U. S. 147, 160, 60 Sup. Ct. 146, 84 L. Ed. 155 (1939).

And on this authority, and others, it is manifest that the right to freely speak against segregation, if that was the true motive of the demonstrators in the case at bar, bears no relation to facts involving two thousand persons marching against the halls of justice and obstructing the public sidewalks there in such a manner that a violation of the

(13)

statute proscribing that conduct is manifest. These demonstrators, like other citizens, must confine their exercise of

constitutional freedoms within lawfully regulated limits of those freedoms.

In support of the second grounds for setting aside this conviction, it is asserted that these laws and the bills of information are too vague and general and hence violate the due process and equal protection clauses of the Fourteenth Amendment.

R. S. 14:103.1 is said to be ambiguous for it is not clear whether the prosecution must show an actual disturbance or only circumstances such that a disturbance may be occasioned. In either event, however, we think there is no ambiguity in that language of the statute for to "disturb the peace" in Louisiana means "* * * to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." Town of Ponchatoula v. Bates, 173 La. 824, 138 So. 851 (1932). To "breach the peace" has the identical meaning in our view and the statute so declares, for it provides that "Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach may be occasioned thereby" commits certain acts "shall be guilty of disturbing the peace." Because the words of the statute have a fixed, definite and commonly understood meaning and a meaning ascribed to them by this court, they are not ambiguous nor is it objectionable that the statute seeks to proscribe conduct which will result in a disturbance of the peace. The statute may lawfully have the prevention of a disturbance as its object as well as punishing

(14)

an actual disturbance. Therefore the accused had adequate notice of the proscribed conduct. Garner v. State of Louisiana, 368 U. S. 157, 82 Sup. Ct. 248, 7 L. Ed. 2d 207 (1961).

With respect to R. S. 14:100.1 the contention is made that the bill of information charging a violation of that statute is fatally defective because it fails to inform defendant of the nature and the cause of the accusation against him, though it is conceded that the statute may be sufficient to describe or legally characterize the offense. U. S. Const. amend. VI; La. Const. of 1921 art, I, §10; R. S. 15:2, R. S. 15:5 and R. S. 15:227.

The Louisiana Constitution, like the United States Constitution, provides that in all criminal prosecutions the accused has a right to be informed of the nature and cause of the accusation.

The argument is advanced here that one cannot be charged with obstruction "of a public sidewalk within the City of Baton Rouge . . ." One must be charged with obstruction of a particular sidewalk, i.e., ". . . that sidewalk on the West side of St. Louis Street, in the City of Baton Rouge, Louisiana, identified by municipal number 200, bounded on the North by . . . and bounded on the south by . . ." But we cannot agree with the contention; the quoted language of the bill of particulars in the beginning of this opinion refers to the sidewalk in "front of the Courthouse", which, together with the date of the occurrence, is definite and clear and furnishes the requisite information to satisfy the constitutional test, which is threefold:

(15)

First, the statement of the accusation should inform the accused of the charges that will be brought against him at the trial in order that he may properly defend himself. Second, the trial judge should be informed by the indictment of what the case involves, so that, as he presides and is called upon to make rulings, he may do so intelligently.

Third, the indictment should form a record from which it can be clearly determined whether or not a subsequent proceeding is barred by the former adjudication.

When the accusation fulfills these purposes, it satisfies the constitutional mandate that the accused must be informed of the nature and cause of the accusation. State v. Scheler, 243 La. 443, 144 So. 2d 389 (1962).

The third contention that there was no evidence tending to prove the crime charged is without merit.

This court is limited in the scope of its review in criminal matters by Article VII, Section 10 of the Constitution of this State "to questions of law only." Although it is recognized in our jurisprudence that a proper interpretation of the foregoing constitutional provision permits a complaint that a conviction based upon "no evidence at all" presents the question of law whether it be lawful to convict an accused without any proof whatsoever as to his guilt, it is firmly established that it is only when there is no evidence at all upon some essential element of the crime charged that the court may set aside a verdict. But, where there is *some* evidence to sustain the conviction, *no matter how little,* this court cannot pass upon the sufficiency thereof. That comes within the exclusive province of the trial judge or jury. State v. Copling, 242 La. 199, 135 So. 2d 271 (1961). (16)

Undoubtedly, from the facts recited, there is some evidence. In our view there is ample evidence to sustain this conviction.

The final grounds relied upon to reverse this conviction is that racial segregation existed in the court where defend-

ant was tried and convicted and this segregation denied him a fair trial in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The record undoubtedly establishes that racial segregation existed in the courtroom as it had for many years.

On April 29, 1963, the United States Supreme Court held that "State-compelled segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal protection of its law." Johnson v. Virginia 31 U. S. L. Week 3353 (U. S. April 29, 1963). But in the Johnson case the objection to segregation was made by a Negro who had been arrested for contempt of court for sitting in seats assigned for white citizens, and the arrest and conviction was for that conduct. In the case before us, there is no charge against the defendant for having violated the court-imposed seating arrangement and none of the parties upon whom the segregation was imposed are before this court in this case. Hence the Johnson case is not authority for reversing this conviction. It has not been made to appear that the segregation resulted in a miscarriage of justice to this defendant. R. S. 15:557. If it were otherwise, it would result that every Negro convicted in that court in the past would be entitled to have his conviction set aside.

For the reasons assigned the conviction and sentence are affirmed.

REHEARING REFUSED
OCT 9 1963

Opinion of the Supreme Court of Louisiana

STATE OF LOUISIANA VS. B. ELTON COX—No. 46,395.

McCALEB, J., Dissenting.

The ruling herein that the bill of information is sufficient to apprise the accused of the nature and cause of the accusation against him is in conflict with our recent decision in State vs. Smith, 243 La. 656, 146 So. (2d) 152, handed down on November 5, 1962.

In the Smith case the defendants were charged in a bill of information containing two counts with violating (1) R. S. 14:100.1 (obstructing public passages) and (2) R. S. 14:103.1 (disturbing the peace) under allegations similar to those made in the separate bills of information which have been upheld in the instant matter. The Court, after setting forth the settled jurisprudence of this State to the effect that it is not a sufficient compliance with the constitutional mandate of Section 10 of Article 1 of the State Constitution (that the accused shall be informed of the nature and cause of the accusation against him) for the bill of information to be couched in the language of the statute when the statutory words do not, themselves, set forth the elements necessary to constitute the offense intended to be punished (see, among other cases, State vs. Verdin, 192 La. 275, 187 So. 666; State vs. Varnado, 208 La. 319, 23 So. (2d) 106 and State vs. Blanchard, 226 La. 1082, 78 So. (2d) 181), quashed the bill of information, holding that the provisions of R. S. 14:100.1 and 14:103.1 were not specific enough to support a charge drawn in their language and that allegations of the particular facts were required in order to comply with the Constitution.

The motion to quash should be sustained.

REHEARING REFUSED
Oct 9th 1963

This in Writ p. 6a-21a

(1) **Opinion of Louisiana Supreme Court**
in case No. 49 in this Court
SUPREME COURT OF LOUISIANA

No. 46,618

STATE OF LOUISIANA

V.

B. ELTON COX

APPEAL FROM DIVISION "A" OF THE NINETEENTH JUDICIAL DISTRICT COURT

HON. FRED A. BLANCHE, JR., JUDGE

FOURNET, Chief Justice.

This case was previously before us on an appeal taken by the defendant, B. Elton Cox, but the bills reserved during his trial were not then considered inasmuch as the only question presented for determination was the legality of the sentence imposed. Finding he had been sentenced within twenty-four hours after his conviction, contrary to the provisions of R. S. 15:521, the sentence was annulled and set aside, the defendant ordered released on bail until such time as legal sentence was imposed, and, in the meanwhile, he was afforded the opportunity to take any pro-

cedural steps to which he was entitled during the delay provided by that statute. See, State v. Cox, 243 La. 917, 148 So. 2d 600.[1]

(2)

This appeal is from the defendant's conviction of violating Section 14:401 of the Revised Statutes of 1950[2] and his sentence thereunder to "pay a fine of $5,000 and to be confined in the parish jail for one year, or in default of the payment of said fine to be imprisoned one year additional, this sentence to run consecutively with" the sentences that day imposed under two other convictions that were affirmed by this court in a decision handed down June 28, 1963. State v. Cox, — La. —, 156 So. 2d 448. The defendant in this case, as in the companion case, is relying for the reversal of his conviction and sentence on five Bills of Exceptions reserved and perfected during the trial, although in

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[1] For the same reason the sentences originally imposed following his conviction under two other statutes were set aside on writs granted to review this action by the trial judge. See, State ex rel. Cox v. Clemmons, 243 La. 264, 142 So. 2d 794.

[2] R. S. 14:401 is in that section of our criminal code dealing with "Offenses Affecting Law Enforcement." Its pertinent portion provides: Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the State of Louisiana, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than five thousand dollars or imprisoned not more than one year, or both."

the record they are not numbered and considered in the order in which they were reserved.[3]

These three charges, as well as a charge of criminal conspiracy under R. S. 14:26 of which this defendant was exonerated by the trial judge, grew out of the same incident and were, by agreement, consolidated for trial, the evidence adduced at that time being made applicable to all. The basic attack on the legality of the conviction is, in essence, identical in all three cases, the only material difference being the facts and contentions specifically applicable to the charges under the statute involved in each.

(3)

In considering these companion cases we found it difficult, as we do here, to answer the arguments of defense counsel without a great deal of duplication and repetition, particularly since the last two bills include the contentions raised in the first three with the usual additional assertion there is no evidence to support the conviction; hence, in order to avoid such repetition and duplication, we adopt the four basic causes assigned by the accused for the reversal of his conviction and sentence as succinctly stated in the opinion in State v. Cox, — La. —, 156 So. 2d 448:

> "First, it is asserted that the specific laws under which he was charged, tried and convicted * * * are

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[3] The 1st was reserved when the trial judge overruled the motion to quash the information; the 2nd when he ruled the state's answer to a request for a Bill of Particulars was adequate; the 3rd is levelled at a purported failure to secure an impartial trial because of the segregated character of the courtroom; and the 4th and 5th, respectively, when the judge overruled motions for a new trial and in arrest of judgment.

unconstitutional in their application, for the conviction thereunder infringes upon the defendant's right of free speech protected by the First Amendment of the United States Constitution which the States cannot deny its citizens because of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

"Second, the claim is made that these laws and the bills of information are too vague and general and hence violate the due process and equal protection clauses of the Fourteenth Amendment.

"Third, it is contended that Cox's trial and conviction were violative of the Fourteenth Amendment for there was no evidence tending to prove the crime charged.

"Fourth, it is contended that the segregated conditions in the courtroom during the trial denied Cox a fair trial in violation of the Sixth and Fourteenth Amendments."

The argument by defense counsel in the case at bar is also almost identical with that presented in the companion cases, both orally and in brief, and, like the Bills of Exceptions, are not only lengthy and repetitious, but, when properly analyzed, as we found in these cases (Nos. 46,395 and 46,396 on the docket of this court), basically unsound in that they are without foundation in fact or in law.

Defendant's first contention is that R. S. 14:401—prohibiting any form of demonstration in or near a building housing a court of the State of Louisiana, or in or near a

(4)

building or residence occupied or used by a judge, juror, witness, or court officer, with the intent of interfering with the administration of justice, or with the intent of influencing such judge, juror, witness, or court officer in the proper discharge of his duties, under which statute the defendant was convicted—is unconstitutional in its application in this case.

While defense counsel concede that interfering with the administration of justice is illegal, as is also the influencing of a judge, juror, witness, or court officer in the proper discharge of his duties, it is contended that if the statute is construed to convict him for demonstrating with his followers in front of the East Baton Rouge Parish courthouse, it is unconstitutional in that it deprives him of his right to peacefully assemble and speak freely, as guaranteed by the First Amendment to the Constitution of the United States; further, that in denying him these rights, it also violates the equal protection and due process clauses of the Fourteenth Amendment to the federal constitution.

In considering similar contentions urged in the two companion cases, we recognized, as did the court below, that under decisions of the Supreme Court of the United States the freedoms guaranteed individuals under the First Amendment are protected by the Fourteenth Amendment from invasion by the states, citing a number of authorities whereby this country's highest court established this rule in the jurisprudence. But we also pointed out that the United States Supreme Court has recognized that the right of freedom of speech and of the press is not absolute, and

held that a state may, by general and non-discriminatory legislation, regulate the exercise of that freedom under its police power. Cantwell v. Connecticut, 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213.

Unquestionably these rights, freedoms, or privileges of peaceful assembly and of expression and discussion—however they may be considered—as well as the impartial administration of justice that is guaranteed under the Sixth Amendment to the Constitution of the United States, are all vital and important to the concepts on which this nation was founded. To paraphrase Mr. Justice Frankfurter in (5)
his concurring opinion in Pennekamp v. Florida, the claims with which we are faced are not those of right and wrong, but of two rights, each highly important to the well-being of society, the core of the problem being to arrive at a proper balance between basic conditions of our constitutional republic—freedom of utterance and peaceful assembly on the one hand, and the proper and impartial administration of justice on the other, and since the latter is one of the chief tests of the true concepts of our constitutional government, it should not be made unduly difficult by irresponsible actions.

In his excellent dissertation on the subject matter, which we adopt as based on sound reasoning and unassailable logic, Justice Frankfurter continues: "Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. *The scope and nature of the constitutional protection of freedom of speech must be viewed in that light*

and in that light applied. The independence of the judiciary is no less a means to the end of a free society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective. For *the judiciary cannot function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court.* A judiciary is not independent unless courts of justice are enabled to administer law *by absence of pressure without,* whether exerted through the blandishments of reward *or the menace of disfavor.* * * * A free press is not preferred to an independent judiciary, nor an independent judiciary to a free press. *Neither has primacy over the other;* both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom (whether of utterance, expression, speech, or peaceful assembly) may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press." Pennekamp v. Florida, 66 Sup. Ct. 1029, 328 U. S. 331, 90 L. Ed. 1295. (The emphasis and language within brackets has been supplied.)

(6)

We think it proper to mention here and now that R. S. 14:401 was not, as contended by defense counsel and urged in two of the bills reserved (to the denial of a motion for a new trial and one in arrest of judgment), adopted by the Louisiana legislature "for the specific purpose and intent to implement and further the state's policy of enforced segregation of races." Instead, it was almost a duplicate of an act introduced in Congress in 1949 (Senate Bill No.

1681 and House Bill No. 3766) condemning picketing, parading, and demonstrations in the environs of federal courts, and passed in 1950 with the full support and approval of the American Bar Association for the reason that such conduct in the immediate vicinity of a building or residence housing a court or court officer was anathema to our concepts of justice according to law. The only difference in the federal statute (18 USCA 1507) and our Act No. 177 of 1950 (now R. S. 14:401), as reflected by the wording of our statute as set out in Footnote No. 2, is that in place of the words "in or near a building housing a court of the United States," our legislature substituted the words "in or near a building housing a court of the State of Louisiana."

The legislative history of the federal act on which ours was patterned discloses it was passed because of picketing conducted by large crowds outside of a federal district court building in Los Angeles, but, primarily, as the result of the disgraceful picketing and demonstrations in, around, and near a federal building in New York housing, among other courts, the one in which Judge Harold R. Medina was—for a period in excess of 9 months in 1949—endeavoring to conduct with some semblance of order the trial of 10 of the top leaders of the communist party in the United States, despite the attempt of followers of this philosophy to turn the trial into a travesty of justice by insults, jeers, and harassments through printed signs, calls, loudspeakers, and other methods of persecution heaped upon Judge Medina and court officers in an effort to intimidate the Judge in particular in the proper and impartial trial of that case. ***It is significant to note,*** however, *that the statute in its*

operation is not limited to any particular group or person. It applies alike to all. And although we can find no other (7)
decision of any court in which the constitutionality of this and like statutes have, heretofore, been assailed, we now hold that R. S. 14:401 is constitutional and was legally enacted under the police power with which this state is endowed to insure the orderly and impartial administration of justice.

The contention that the statute itself, as well as the Bill of Information, are too vague and uncertain to inform the defendant of the nature of the charge against him, as required by Section 10 of Article I of the Constitution of Louisiana; R. S. 15:227; and the Sixth Amendment to the Constitution of the United States, is without merit. As shown above, the mischief sought to be denounced by the statute is as clear as the English language can make it, and since, in drawing the Bill of Information, the district attorney not only tracked the language of the statute itself, but gave such additional facts and circumstances as were necessary to inform the defendant of the nature of the charge against him and also furnish the basis for a plea of former jeopardy, or autrefois acquit, in the event another charge covering this same incident was ever returned against him, it fully complies with all pertinent constitutional and statutory requirements. The Fifth Amendment to the Constitution of the United States; Section 9 of Article I of the Constitution of Louisiana; R. S. 15:274-283; State v. Straughan, 229 La. 1036, 87 So. 2d 523; State v. Scheler, 243 La. 443, 144 So. 2d 389, and the authorities therein cited.

is limited to questions of law alone under Section 10 of Article VII of the Constitution of Louisiana. And although there are decisions of this court recognizing that where there is no evidence at all to support the establishment of an essential element of the crime charged a question of law that we may review is presented (State v. Di Vincenti, 232 La. 13, 93 So. 2d 676; State v. La Borde, 234 La. 28, 99 So. 2d 11; and State v. Bueche, 243 La. 160, 142 So. 2d 381, as well as the authorities therein cited), where there is some evidence to sustain the conviction the sufficiency thereof is a matter that lies within the exclusive province of the trial judge and/or jury, and is not reviewable by this court. State v. Brazzel, 229 La. 1091, 37 So. 2d 609; State v. Domino, 234 La. 950, 102 So. 2d 227; and State v. Copling, 242 La. 199, 135 So. 2d 271, as well as the authorities therein cited.

In our opinion there is ample evidence to sustain the conviction in this case. The record of the testimony (made a part in its entirety by defense motions for a new trial and in arrest of judgment) discloses that according to the estimate of Cox himself between 1,500 and 3,800 colored people congregated in mass formation a couple of blocks (9)
from the courthouse on December 15, 1961. This was not only the largest mass grouping of any people in that or the downtown Baton Rouge area within the memory of any of the witnesses, but was composed largely of students from Southern University, a state university for colored people located a few miles north of Baton Rouge, that had absented themselves from school on that day in order to par-

ticipate in this demonstration. All were admittedly well trained and indoctrinated and subject to any desired activity required by Cox by so simple a signal as the snapping of his fingers.

This large mass of demonstrators was met by local law enforcement officers, and, when questioned, Cox informed them they were preparing to move on the courthouse in protest against the incarceration (on the fourth floor of that building) of some 23 colored people who had been "illegally" arrested the day previous; whereupon Cox was informed this would avail him and his followers nothing, the proper remedy being to resort to the courts since only there could it be decided whether these people had, indeed, been "illegally" arrested.[4] And despite the fact Cox told the officers he and the demonstrators were going to the courthouse anyway and would there *peacefully* for a few minutes by singing a hymn and patriotic song, praying, and pledging allegiance to the flag, upon arrival across the street from the front of the courthouse, and at a signal from Cox, and demonstrators immediately pulled from beneath their coats theretofore hidden placards and signs with shouts and yells that interspersed the singing and other parts of the purported "program," with the result that, in return, those in the jail answered by yelling, screaming, singing, and banging on the walls and doors of the cells in which they were lodged on that side of the building. Cox added to the situation that had by then reached a high pitch

[4] It does not appear from the record that any attempt whatsoever had been made to secure the release of these 23 persons on bail, or by resort to the available writ of habeas corpus.

of emotional tension by making an "inflammatory" speech, causing some of the officers to feel this now disorderly and seething mob intended to storm the courthouse and liberate the 23 people there incarcerated, and that a riot was inevitable.

(10)

The Sheriff, sensing the seriousness of this explosive situation, by means of a loudspeaker ordered the demonstrators to move on. However, Cox, and on his instruction the group, openly defied this command and continued the "fiery" and "frenzied" demonstration, in which they were still being joined by the 23 people incarcerated in the building, despite a second admonition by the Sheriff. It was only by the use of tear gas that the Sheriff, his deputies, and other law enforcement officers (about 80 in all) were able to disperse the group. The trial judge who presided over these proceedings against Cox—and who, with one or more of the other three judges having chambers in this building in which they had been holding court since early in September, would eventually be required to determine in a proper trial whether the incarcerated people had been "illegally" arrested—stated in his reasons for judgment that he was so "fearful" and "apprehensive" of the outcome of this demonstration by such a large mass of people in the area of the courthouse he was, in fact, intimidated, and, upon learning the demonstration was imminent, closed his office and left the building.

These facts belie defense argument that by his conviction Cox and his followers were denied the right to "peacfully" assemble as guaranteed by the First and Fourteenth Amendments to the federal constitution.

Moreover, while the courts have recognized that picketing is an exercise of a form of free speech that is protected by these constitutional shields, this sweeping analogy as first enunciated by the United States Supreme Court in the case of Thornhill v. State of Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, has since been greatly refined and restricted. For example, this high court in Hughes v. Superior Court of State of California, 339 U. S. 460, 70 S. Ct. 718, 721, 94 L. Ed. 985, pointed out that "* * * *while picketing is a mode of communication it is* inseparably *something more and different* * * * *'since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.'* (11)

* * * *the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication.* * * **It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent.* Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. * * * 'a state is not required to tolerate in all places and all circumstances even peaceful picketing * * *.'" In addition, mass picketing is not only reprobated—particularly where it interferes with and hampers others in the orderly discharge of their duties and their right to be where they are in connection with them—but picketing that is not peaceful is prohibited. See the annotation on this subject in 32 ALR 2d 1026, particu-

larly the section No. 6 on page 1036, as well as the supplements thereto. (The emphasis has been supplied.)

From the foregoing it is manifest that the view of the incident as now contended by Cox bears no relation whatever to the established facts disclosing that between 1,500 and 3,800 people marched "en masse" against the halls of justice and acted near such halls in a manner calculated to interfere with the orderly administration of justice. As stated in our decision in the companion cases, "These demonstrators, like other citizens, must confine their exercise of constitutional freedom within lawfully regulated limits of those freedoms." Or, as Judge Learned Hand put it in upholding the conviction of the 10 communist leaders tried before Judge Medina, "Nobody doubts that when the leader of a mob already ripe for riot gives the word to start, his utterance is not protected by the Amendment." See, United States v. Dennis, 183 F. 2d 201.

The final error complained of in this case—that the spectators in the courtroom in which Cox was tried were segregated, thus denying him a fair trial in violation of the Sixth Amendment to the federal constitution, and the equal protection and due process clauses of the Fourteenth—was adjudicated adversely to the defendant in our decision in the companion cases.

Counsel do not claim that Cox did not receive a fair and (12)
impartial trial in accordance with the accepted rules and regulations fixed for the orderly trial of cases in the courts of this state, as required by our constitution and statutes, or point out in what manner he was prejudiced by the separation of the spectators in the courtroom where he was tried.

Instead, it is contended that the constitutional rights of "these spectators" were violated during the process of his trial, and it is his right to assert the denial of the rights of these people thus purportedly occurring.

One need only review the record in this case to readily discern the defendant received a fair and impartial trial, being given every consideration and protection afforded all persons accused of crimes under our constitutional and laws by a judge who acted throughout with great patience and forebearance in an effort to maintain a reasonable semblance of order in the courtroom during the trial, as well as to accommodate the colored spectators, even authorizing the use by them of all seats not then occupied by the white people. Finally, on the third day of the trial, he went so far as to have an officer of the court count the number of seats still vacant and then go into the corridors outside the courtroom and inform those congregated there of their availability. Nevertheless, the trial continued with many still remaining vacant.

To hold, as contended by Cox, that his conviction is a nullity merely because of the segregated condition of the courtroom, would, of necessity, make every conviction of an accused during the past years in all of the courts of the state, and regardless of race, nullities, with the result that everyone now confined in our penal institutions would be entitled to have his conviction set aside, and these thousands of criminals would then be turned loose on the people of the state.

For the reasons assigned, the conviction and sentence are affirmed.

Motions in case No. 24 in this Court

(16)

Notice of Motion to Quash

TO THE HONORABLE, THE JUDGES OF THE NINETEENTH JUDICIAL DISTRICT COURT, IN AND FOR THE PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA:

And now into this Honorable Court, through his undersigned counsels, comes B. ELTON COX, the defendant in the above entitled and numbered cause, moves to quash the Bill of Information for the following reasons, to-wit:

-1-

That defendant denies that he violated the provision of LSA-R. S. 14:100.1 as charged in the Bill of Information. However, defendant alleges and avers that on the 15th day of December 1961, in protest of racial segregation, defendant, a citizen of the United States, together with others, did in exercise of his rights accorded defendant by and under the First Amendment to the Constitution of the United States of America, peaceably assemble on a public sidewalk within the City of Baton Rouge, Parish of East Baton Rouge, State of Louisiana.

-2-

That while the arrest and charge were for "Obstructing Public Passages", there was no commission of such crime

(17)

or offense, except for the activities in which the defendant engaged to protest racial segregation, and that the use of the criminal process in such a situation denies and deprives the defendant of his rights, privileges, immunities and liberties guaranteed defendant, a citizen of the United

States, by the First and Fourteenth Amendments to the Constitution of the United States of America.

-3-

That LSA-R. S. 14:100.1 is unconstitutional on its face, repugnant to the due process and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States of America, in that, it expressly extends to a bona fide legitimate labor organization the rights accorded and guaranteed citizens of the United States by the First Amendment to the Constitution of the United States of America, while denying and depriving defendant, a member of the Negro race, the same rights.

-4-

That LSA-R. S. 14:100.1 is unconstitutional on its face, in that it denies and deprives defendant, a citizen of the United States of America, of due process and equal protection of the laws, guaranteed the defendant by the Fourteenth Amendment to the Constitution of the United States of America.

-5-

That if said Statute, LSA-R. S. 14:100.1, as amended, does embrace within its terms and meanings, that the defendant, by protesting racial segregation "obstructs public passages", then and in that event said Statute, LSA-R. S. 14:100.1 is unconstitutional, in that it deprives your defendant of his rights, privileges, immunities and/or liberties, without due process of law and denies him the equal pro-

tection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

-6-

That the Bill of Information is insufficient to charge an (18)
offense or crime under LSA-R. S. 14:100.1, except violating the rights, privileges, immunities and liberties accorded and guaranteed the defendant, a citizen of the United States, by and under the First and Fourteenth Amendments to the Constitution of the United States of America.

WHEREFORE, your defendant, B. ELTON COX, prays that this Motion to Quash be maintained and that the said Bill of Information as to him, and as far as he is concerned be declared null and void and that he be discharged therefrom.

Attorney for Defendant:

JOHNNIE A. JONES

.....

Robert F. Collins
Nils R. Douglas
Lolis E. Elie
2211 Dryades Street
New Orleans 13, Louisiana

(Signed) BY: JOHNNIE A. JONES

Opinion Overruling Motion

That on a subsequent day of Court a hearing was had contradictorily with the state on the said motions to Quash and that the court overruled and denied the said motions to Quash to which your defendant then and there objected and reserved a bill of exceptions to the information, the motion to Quash, the States answer to the motion to quash and to the Courts ruling denying the said Motion to Quash, and now your defendant perfects this formal bill of exceptions making a part of same the said information, the motion to Quash, the States answer to the motion to Quash, any evidence offered or testimony heard on the motion to Quash, the Courts ruling on same, and the entire record in these proceedings, and first submitting this their formal bill of exceptions to the District Attorney, now tenders the same to the court and prays that the same be signed and sealed by the judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly this 10th day of October 1962.

(Signed) Fred A. Blanche, Jr.
JUDGE

(30)

Motion in Arrest of Judgment

NOW INTO COURT, after verdict against B. ELTON COX, and before sentence the said B. ELTON COX, through undersigned counsel, and moves the Court here to Arrest Judgment herein and not to pronounce the same because of manifest errors in the record appearing to-wit:

-1-

That at the beginning of the trial (Transcript Page 4) attorney Johnny Jones moved *for the record to show* that Murphy Bell, Attorney, was associated on the case with him.

That the court ordered a minute entry to that effect.

That Attorney Jones also asked for the same record to show that the courtroom was segregated to which request the District Attorney objected and to which the court replied:

> "Also let the record show that it has been the practice and custom in the East Baton Rouge Parish Courthouse for many, many years, and in the purpose of maintaining order in the courtroom, separate portions are placed in the courtroom for both colored and white *and let the record especially show* that the judge in this case ordered that half of the seats that were formerly reserved and available for white people are now being occupied and filled by colored people".

(31)

That on Wednesday, January 31, 1962 (transcript page 278) Johnny Jones renewed his objection to the segregated courtroom, in the following words:

Motion in Arrest of Judgment

> "Your Honor, I want to renew our objection about court being segregated and I want to reserve a formal bill".

To which the court replied:

> "Well, I just don't think it makes any difference I don't know if he has got any right to a bill on it or not, but I will let him perfect on it, if he wants to".

Then after some discourse between Mr. Pitcher and Mr. Jones the court said:

> "Let it stand as it is".

The above statements are held by counsel to constitute a correct reserving of an objection and the reserving of a Bill of Exceptions to the overruling of the Motion to Desegregate the Courtroom. If not so deemed, then it is our alternative position that the remarks of the court constitutes a part of the record which may properly be presented in review for error in a Motion in Arrest of Judgment.

Thus the record shows on its face that defendant was deprived of rights guaranteed him under the equal protection of the laws and due process of law clauses of the Fourteenth Amendment to the Constitution of the United States.

-2-

That the Bills of Information are insufficient to charge a crime under L. S. A.-R. S. 14:103.1 and 14:100.1.

-3-

That the convictions of defendant for violation of L. S. A.-R. S. 14:103.1 paragraph A subpart 1 and for violation of L. S. A.-R. S. 14:100.1 denied defendant rights guaranteed

to him under the first amendment to the Constitution of the United States.

(32)

That the convictions of defendant for violation of L. S. A.-R. S. 14:103.1 paragraph A subpart 1 and for violation of L. S. A.-R. S. 14:100.1 denied defendant rights guaranteed to him under the Sixth Amendment to the Constitution of the United States.

-5-

That the statutes under which the defendant was convicted are unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United States in that they were enacted for the specific purpose and intent to implement and further the states policy of enforced segregation of races.

-6-

That the statutes under which the defendant was convicted are unconstitutional and in contravention of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States in that they were arbitrarily, capriciously and discriminately enforced against persons peacefully exercising their rights of freedom of speech in protest against racial segregation.

-7-

That the statutes under which defendant is convicted and the Bills of Information filed thereunder are unconstitutional for want of adequate notice, vagueness and uncertainty therefore said statutes could not constitutionally be construed to cover the activities sought to be punished by the Louisiana Courts.

-8-

That the judgments are contrary to the law and the evidence in that there is no evidence to support a finding of guilt under either statute thus violating defendants rights under the Due Process Clause of the Fourteenth Amendment.

-9-

That the judgments are unconstitutional in violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States in that (33)
it is constitutionally impossible to charge and convict a defendant for disturbing the peace when the body of the statute prohibits crowding or congregating'' . . . under circumstances such that a breach of the peace *may* be occasioned thereby.

WHEREFORE, your mover prays that, a rule nisi issue out of this Honorable Court directed to Honorable Sargent Pitcher, Jr., District Attorney ordering him to show cause, if any he has, why a Motion in Arrest of Judgment should not be granted in these proceedings.

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 Dryades St., N. O. La.
(Signed) BY Nils R. Douglas
MURPHY W. BELL
971 South 13th St., B. R., La.

OF COUNSEL:
CARL RACHLIN
280 Broadway
New York, New York

(56)

Opinion on Motion in Arrest of Judgment

The Court after hearing the said Motion in Arrest of Judgment of the defendants, denied and overruled the same, and to such action of the Court, counsel for the defendant then and there objected and reserved a formal bill of exceptions, and now counsel perfects this his formal bill of exceptions to the overruling and denying of the said Motion in Arrest of Judgment and makes a part hereof, the bill of information, the Motion to Quash, any evidence or testimony heard or offered on the trial of these cases on the merits, the Motion in Arrest of Judgment, the Motion For A New Trial, the Courts ruling on the Motion In Arrest Of Judgment, the Courts ruling on the Motion For a New Trial and the entire record in these proceedings and first submitting this his bill of exceptions to the District Attorney, now tenders the same to the court and prays the same be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided which is done accordingly this 10th day of October 1962.

(Signed) Fred A. Blanche, Jr.
JUDGE

To be in handwritten sheet

(35)

Motion for New Trial

NOW INTO COURT, through undersigned counsel comes B. ELTON COX, the defendant in the above entitled and numbered cause and moves the court that the verdict rendered herein be set aside and a New Trial ordered, for the following reasons:

-1-

That the Bills of Information are insufficient to charge a crime under L. S. A. R. S. 14:103.1 and 14:100.1.

-2-

That the convictions of defendant for violation of L. S. A.-R. S. 14:103.1 paragraph A subpart 1 and for violation of L. S. A.-R. S. 14:100.1 denied defendant rights guaranteed to him under the first amendment to the Constitution of the United States.

-3-

That the convictions of defendant for violation of L. S. A.-R. S. 14:103.1 paragraph A subpart 1 and for violation of L. S. A.-R. S. 14:100.1 denied defendant rights guaranteed to him under the Sixth Amendment to the Constitution of the United States.

-4-

That the courts overruling of defendants objection to the segregated seating in the courtroom to which ruling de-

(36)

fendant reserved a formal Bill of Exceptions was error and prejudicial to the defendant in that it denied him the right to a fair trial guaranteed to him by Article I Section 6 of the Constitution of the State of Louisiana. Said error further denied defendant the equal protection of the laws

PER CURIAM

With regard to the objection of the accused to the segregated seating in the courtroom, the court's own order turned over approximately three-fourths of the seats in the courtroom to members of the colored race leaving approximately one-fourth of the courtroom for members of the white race. Notwithstanding this, counsel urges that this denied accused a fair trial. The transcript of the record of trial will speak for itself in this regard.

Finally, the wisdom of segregating the races at the time of this trial when racial tension had been occasioned by the accused, whether in pursuit of freedom of speech or not, is beyond question. Indeed, it insured the accused a fair trial and was a step to preserve order in the court, for which this judge is responsible.

Baton Rouge, Louisiana, this 10th day of October, 1962.

(signed) Fred A. Blanche, Jr.
Judge, 19th Judicial District Court

With regard to the objection of the accused to the segregated seating in the courtroom, the Court on its own order turned over approximately three-fourths of the seats in the courtroom to members of the colored race leaving approximately one-fourth of the courtroom for members of the white race. Notwithstanding this, counsel urges that this denied the accused a fair trial. The transcript of the record of trial will speak for itself in this regard.

Finally, the wisdom of segregating the races at the time of this trial when racial tension had been occasioned by the accused, whether in pursuit of freedom of speech or not, is beyond question. Indeed, it insured the accused a fair trial and was a step to preserve order in the Court, for which this judge is responsible.

Baton Rouge, Louisiana,
this 10th day of October,

1962.

(signed) Fred A. Blanche, Jr.
Judge, 19th Judicial District Court

and due process of law guaranteed to him by the first section of the Fourteenth Amendment to the Constitution of the United States.

-5-

That the statutes under which the defendant was convicted are unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United States in that they were enacted for the specific purpose and intent to implement and further the states policy of enforced segregation of races.

-6-

That the statutes under which the defendant was convicted are unconstitutional and in contravention of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States in that they were arbitrarily, capriciously and discriminately enforced against persons peacefully, exercising their rights of freedom of speech in protest against racial segregation.

-7-

That the statutes under which defendant is convicted and the Bills of Information filed thereunder are unconstitutional for want of adequate notice, vagueness and uncertainty therefore said statutes could not constitutionally be construed to cover the activities sought to be punished by the Louisiana Courts.

-8-

That the judgments are contrary to the law and the evidence in that there is no evidence to support a finding of guilt under either statute thus violating defendant's rights under the Due Process Clause of the Fourteenth Amendment.

That the judgments are unconstitutional in violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States in that it is consitutionally impossible to charge and convict a defendant for disturbing the peace when the body of the statute prohibits crowding or congregating ". . . under circumstances such that a breach of the peace *may* be occasioned thereby".

WHEREFORE, your mover prays that, a rule nisi issue out of this Honorable Court directed to Honorable Sargent Pitcher, Jr., District Attorney ordering him to show cause, if any he has, why a New Trial should not be granted in these proceedings.

ROBERT F. COLLINS

NILS R. DOUGLAS

LOLIS E. ELIE
2211 Dryades Street
New Orleans 13, Louisiana

(Signed) BY: NILS R. DOUGLAS

MURPHY W. BELL
971 South 13th St., Baton Rouge, La.

OF COUNSEL:

CARL RACHILIN
280 Broadway
New York, New York

Motions in Case No. 49 in this Court

(22)

Notice of Motion to Quash

To the Honorable, the Judges of the Nineteenth Judicial District Court, in and for the Parish of East Baton Rouge, State of Louisiana:

AND NOW into this Honorable Court, through his undersigned counsels, comes B. Elton Cox, the defendant in the above entitled and numbered cause, moves to quash the Bill of Information for the following reasons, to-wit:

1.

That the defendant alleges and avers that he did on December 15, 1961, in protest of racial segregation, engage in a demonstration by assembling on the West side of St. Louis Street, across the street from the Courthouse Building of East Baton Rouge Parish, State of Louisiana, but denies that he engaged in any activity whatsoever with the intent of violating LSA-R. S. 14:401 as charged in the Bill of Information.

(23)

2.

That LSA-R. S. 14:401 is sufficiently vague and indefinite to be unconstitutional on its face, in that, it does not prescribe the distance or a limit from the Courthouse Building where the defendant or any other citizen of the United States of America can lawfully assemble in exercise of the rights accorded the defendant, or any other citizen of the United States of America, by the First Amendment to the Constitution of the United States of America.

3.

That LSA-R. S. 14:401 is so vague and indefinite in its construction so as to deprive defendant of his rights, privileges, immunities and/or liberties without due process of law and denies him the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

4.

That the said Bill of Information does not allege any unlawful act or acts committed by the defendant, except violating the rights of freedom of speech, press, assembly and petition accorded the defendant, a citizen of the United States, by the First Amendment to the Constitution of the United States of America.

5.

That while the arrest and charge were for demonstrating with the intent to interfere with, obstruct and impede the administration of justice, and with the intent of influencing a Judge, witnesses and Court Officers, in the discharge of their duties, there was no such activity or activities, except the activity or activities in which the defendant engaged to protest racial segregation, and that the use of the criminal process in such a situation denies and deprives the defendant, a citizen of the United States, of his rights, privileges immunities and liberties guaranteed defendant by the Fourteenth Amendment to the Constitution of the United States of America.

6.

That if said Statute LSA-R. S. 14:401, as amended, does embrace within its terms and meanings, that defendant, by

engaging in a demonstration in protest of racial segregation interferes with, obstructs, impedes the administration of justice, and influences Judges, witnesses and Court officers in the discharge of their duties, then and in that event said Statute, LSA-R. S. 14:401, is unconstitutional in that it deprives your defendant of his rights, privileges, immunities and/or liberties without due process of law and denies him the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

7.

That the Bill of Information is insufficient to charge an offense or crime under LSA-R. S. 14:401, except violating the rights, privileges, immunities and liberties accorded and guaranteed the defendant, a citizen of the United States, by and under the First and Fourteenth Amendments to the Constitution of the United States of America.

WHEREFORE, your defendant, B. Elton Cox, prays that this Motion to Quash be maintained and that the said Bill of Information as to him, and as far as he is concerned be declared null and void and that he be discharged therefrom.

Attorneys for Defendant:

JOHNNIE A. JONES
ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 Dryades Street
New Orleans 13, Louisiana

/s/ By: Johnnie A. Jones

Opinion on Motion to Quash

(26)

That on a subsequent day of Court a hearing was had contradictorily with the state on said motion to Quash and that the court overruled and denied the said motion to Quash to which your defendant then and there objected and reserved a bill of exceptions to the information, the motion to Quash, the States answer to the motion to quash and to the Courts ruling denying the said Motion to Quash, and now your defendant perfects this formal bill of exceptions making a part of same the said information, the motion to Quash, the States answer to the motion to Quash, any evidence offered or testimony heard on the motion to Quash, the Courts ruling on same, and the entire record in these proceedings, and first submitting this his formal bill of exceptions to the District Attorney, now tenders the same to the court

and prays that the same be signed and sealed by the judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly this *31st* day of *January* 1963.

(Signed) Fred A. Blanche, Jr.
JUDGE

Notice of Motion in Arrest of Judgment

(13)

Now into Court, after verdict against B. Elton Cox, and before sentence comes the said B. Elton Cox, through undersigned counsel, and moves the Court here to Arrest Judgment herein and not to pronounce the same because of manifest errors in the record appearing to-wit:

1.

That at the beginning of the trial (Transcript Page 4) attorney Johnny Jones moved for the record to show that Murphy Bell, Attorney, was associated on the case with him. That the court ordered a minute entry to that effect. That Attorney Jones also asked for the same record to show that the courtroom was segregated to which request the District Attorney objected and to which the court replied:

> "*Also let the record show* that it has been the practice and custom in the East Baton Rouge Parish Courthouse for many, many years, and in the purpose of maintaining order in the courtroom, separate portions are placed in the courtroom for both colored and white and *let the record* especially show that the

(14)

> judge in this case ordered that half of the seats that were formerly reserved and available for white people are now being occupied and filled by colored people". (italics ours)

That on Wednesday, January 31, 1962 (transcript page 278) Johnny Jones renewed his objection to the segregated courtroom, in the following words:

> "Your Honor, I want to renew our objection about court being segregated and I want to reserve a formal bill".

To which the court replied:

> "Well, I just don't think it makes any difference I don't know if he has got any right to a bill on it or not, but I will let him perfect on it, if he wants to".

Then after some discourse between Mr. Pitcher and Mr. Jones the court said:

> "Let it stand as it is".

The above statements are held by counsel to constitute a correct reserving of an objection and reserving of a Bill of Exceptions to the overruling of the Motion to Desegregate the Courtroom. If not so deemed, then it is our alternative position that the remarks of the court constitutes a part of the record which may properly be presented in review for error in a Motion in Arrest of Judgment.

Thus the record shows on its face that defendant was deprived of rights guaranteed him under the equal protection of the laws and due process of law clauses of the Fourteenth Amendment to the Constitution of the United States.

2.

That the Bills of Information are insufficient to charge a crime under L. S. A.-R. S. 14:401.
(15)

3.

That the convictions of defendant for violation of L. S. A.-R. S. 14:401 denied defendant rights guaranteed to

him under the first amendment to the Constitution of the United States.

4.

That the convictions of defendant for violation of L. S. A.-R. S. 14:401 denied defendant rights guaranteed to him under the Sixth Amendment to the Constitution of the United States.

5.

That the statute under which the defendant was convicted is unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United States in that it was enacted for the specific purpose and intent to implement and further the state's policy of enforced segregation of races.

6.

That the statute under which the defendant was convicted is unconstitutional and in contravention of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States in that they were arbitrarily, capriciously and discriminately enforced against persons peacefully exercising their rights of freedom of speech in protest against racial segregation.

7.

That the statute under which defendant is convicted and the Bill of Information filed thereunder is unconstitutional for want of adequate notice, vagueness and uncertainty therefore said statute could not constitutionally be con-

strued to cover the activities sought to be punished by the Louisiana Courts.

8.

That the judgment is contrary to the law and the evidence in that there is no evidence to support a finding of guilt under said statute thus violating defendant's rights (16)
under the Due Process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States of America.

WHEREFORE, your mover prays that, a rule nisi issue out of this Honorable Court directed to Honorable Sargent Pitcher, Jr., District Attorney ordering him to show cause, if any he has, why a Motion in Arrest of Judgment should not be granted in these proceedings.

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE
2211 Dryades Street
New Orleans 13, Louisiana

(Signed) By: Nils R. Douglas
MURPHY W. BELL
971 South 13th Street
Baton Rouge, Louisiana

Of Counsel:

CARL RACHLIN, ESQ.
280 Broadway
New York, New York

Opinion on Motion in Arrest of Judgment

(37)

The Court, after due consideration of the Motion in Arrest of Judgment filed and submitted by counsel for accused, denied and overruled same. To which ruling of the Court, counsel for accused excepted and reserved a formal bill of exceptions, making a part of the bill, the entire record of these proceedings and the motion filed. Defendant first submitting this his bill of exceptions to the District Attorney now tenders the same to the Court and prays that the same be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly this *31st* day of *January* 19*63*.

(Signed) Fred A. Blanche, Jr.
JUDGE

Notice of Motion for New Trial

(18)

NOW INTO COURT, through undersigned counsel comes B. Elton Cox, the defendant in the above entitled and numbered cause and moves the court that the verdict rendered herein be set aside and a New Trial ordered, for the following reasons:

—1—

That the Bill of Information is insufficient to charge a crime under L. S. A.-R. S. 14:401.

—2—

That the conviction of defendant for violation of L. S. A.-R. S. 14:401 denied defendant rights guaranteed to him under the First amendment to the Constitution of the United States.

—3—

That the conviction of defendant for violation of L. S. A.-R. S. 14:401 denied defendant rights guaranteed to him under the Sixth Amendment to the Constitution of the United States.

—4—

That the courts overruling of defendant's objection to the segregated seating in the courtroom to which ruling defendant reserved a formal bill of Exceptions was error and prejudicial to the defendant in that it denied him the right to a fair trial guaranteed to him by Article I Section 6 of the Constitution of the State of Louisiana. Said error further denied defendant the equal protection of the laws and due process of law guaranteed to him by the First Section

Notice of Motion for New Trial

(19)
of the Fourteenth Amendment to the Constitution of the United States.

—5—

That the statute under which the defendant was convicted is unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United States in that it was enacted for the specific purpose and intent to implement and further the states policy of enforced segregation of races.

—6—

That the statute under which the defendant was convicted is unconstitutional and in contravention of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States in that it was arbitrarily, capriciously and discriminately enforced against persons peacefully, exercising their rights of freedom of speech in protest against racial segregation.

—7—

That the statute under which defendant is convicted and the Bill of Information filed thereunder are unconstitutional for want of adequate notice, vagueness and uncertainty therefore said statute could not constitutionally be construed to cover the activities sought to be punished by the Louisiana Courts.

—8—

That the judgment is contrary to the law and the evidence in that there is no evidence to support a finding of guilt

under said statute thus violating defendant's rights under the Due Process Clause of the Fourteenth Amendment.

—9—

That the Court erred to the prejudice of the accused by denying the Motion to Quash.

—10—

That the Court erred to the prejudice of the accused by denying the Application for a Bill of Particulars.

(20)

WHEREFORE, your mover prays that, a rule nisi issue out of this Honorable Court directed to Honorable Sargent Pitcher, Jr., District Attorney ordering him to show cause; if any he has, why a New Trial should not be granted in these proceedings.

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS R. ELIE

(Signed) By: Nils R. Douglas
MURPHY W. BELL
971 South 13th Street
Baton Rouge, Louisiana

Of Counsel:

CARL RACHLIN
New York, New York

Notice of Motion for New Trial

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority personally came and appeared:

NILS R. DOUGLAS

who after first being duly sworn did depose and say that he is the attorney in the above matter and all the allegations herein contained are true and correct.

(Signed) Nils R. Douglas
NILS R. DOUGLAS

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 29 DAY
OF JANURY, 1963.

(Signed) Murphy W. Bell
NOTARY PUBLIC

(31)

Opinion on Motion for New Trial

The Court, after hearing the said Motion of the defendant for a New Trial, denied and overruled the same, and to such action of the court, counsel for the defendant then and there objected and reserved a formal bill of exceptions and counsel now perfects this his formal bill of exceptions to the overruling of the Motion for a New Trial and makes a part hereof the bill of information, the motion to quash, the Courts ruling overruling the motion to quash and any evidence offered or testimony heard on the trial of the case on the merits, the motion for a New Trial, the courts ruling on the motion for a New Trial and the entire record in these proceedings, and first submitting this his bill of exceptions to the District Attorney now tenders the same to the Court and prays that the same be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly this 31st day of January 1963.

(Signed) Fred A. Blanche, Jr.
JUDGE

(48)

Opinion on Motion for New Trial

The Court, after hearing the said Motion of the defendant for a New Trial, denied and overruled the same, and to such action of the court, counsel for the defendant then and there objected and reserved a formal bill of exceptions and counsel now perfects this his formal bill of exceptions to the overruling of the Motion for a New Trial and makes a part hereof the bill of information, the motion to quash, the Courts ruling overruling the motion to quash and any evidence offered or testimony heard on the trial of the cases on the merits, the motion for a New Trial, the courts ruling on the motion for a New Trial, and the entire record in these proceedings, and first submitting this his bill of exceptions to the District Attorney now tenders the same to the Court and prays that the same be signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided, which is done accordingly this 10th day of October 1962.

(Signed) Fred A. Blanche, Jr.
JUDGE

Take in handwritten sheet
Then take in Rec. at 22a-34a

(4) **Excerpts From Transcript of Trial**

Mr. Jones: Your Honor, I would like to move to associate attorney Murphy Bell on the case with me.

The Court: All right.

Mr. Jones: I would like for the record to show that he is now being associated on the case.

The Court: Show a minute entry to that effect.

Mr. Pitcher: No objection.

Mr. Jones: I would also like for the record to show that

(5)

this case is one where the defendant is being charged for the protest of racial segregation and that within the Courthouse itself that the defendant is being tried in that racial segregation is being practiced and that there are interested parties, citizens on the outside of court waiting—

Mr. Pitcher: I object to the remarks of counsel—

Mr. Jones: —who are interested in the case and that there are seats vacant in the court which are being reserved for the whites and that the Negro citizens who are interested in the case and the outcome of the case are not permitted to utilize these seats. I would like for that to be made a part of the record.

The Court: Also, let the record show that it has been the practice and custom in the East Baton Rouge Parish

(6)

Courthouse for many, many years, and in the purpose of maintaining order in the courtroom, separate portions are placed in the courtroom for both colored and white, and let the record especially show that the judge in this case ordered that half of the seats that were formerly reserved

and available for white people are now being occupied and filled by colored people.

Mr. Pitcher: If Your Honor Please, while Your Honor is well aware of what is going on, I am sure that the Supreme Court of the United States will not be, and for that reason, I ask that Your Honor appoint a Deputy Sheriff to personally count the number of people in this room to be able to testify as to the number of people present in (7)
court and the seats available and the number of white people present. I think the State is entitled to that.

The Court: All right.

(A Deputy Sheriff was so appointed by the Court at this time and ordered to count the people in the courtroom while the proceedings were going on.)

Mr. Jones: If the count is to be made, Your Honor, we would also like to make a count of those who are waiting on the outside.

The Court: Count them, too.

Mr. Jones: And count the number of seats that are still available.

The Court: All right.

(340)

Excerpts From Transcript of Trial

Testimony of Thomas Terrell Edwards, Captain in Charge of Jail, and Herman Thompson

By the Court:

Q. In response to a request of the Court did you count the number of colored people sitting in the courtroom at the time court opened on, what day was that—Monday? A. Day before yesterday.

Mr. Jones: Monday, the twenty-ninth.

Q. Did you do that? A. Yes, sir, I did.

Q. And how many people were sitting in here? A. There was 127 colored and 8 whites in the courtroom behind the rail.

Q. Behind the rail. A. At the first count I made. Now, I made two, If Your Honor remembers. The second count there was the same number of colored, 127, and there were 14 whites.

Q. How much later was that? A. Oh, about two hours, if I recall correctly.

Q. When court opened there were 127 colored and 8
(341)
whites, is that correct? A. Yes, sir.

Q. And approximately how many seats were reserved by the Court for whites? A. Forty-two.

Q. How many colored were on the outside? A. Eighty-eight.

Q. Eighty-eight? A. Yes, sir.

By Mr. Jones:

Q. Would they be waiting to get in, sir? A. None of them indicated that they wanted to get in. They were standing in the hall is all I could tell.

By the Court:

Q. Was that at the same time, because it looked like to me that there were more than eight-eight. A. At the time I counted, sir, there were just eighty-eight. Now, I was told—

Q. How much later was that than when I first told you—when we opened Court, how much longer after that did you go out and count? A. Well, I made the second count in the courtroom and then I went outside and made a count, and I believe it was approximately two hours between the two counts. I am guessing at that time. At the time I really don't recall, sir.

(342)

Q. At the time that the court was opened, wasn't there more out there in the hall than there were at the time you took the count? A. I don't know, sir.

Q. I was told there were. A. I was told that at several times in the afternoon there 200 or 250, but I didn't see them. I didn't go out there.

Q. Do you know anyone who could make an estimate to that effect among the officers? A. Captain Henderson or Captain Thompson could.

The Court: All right, is that all?

By Mr. Jones:

Q. Did you reserve any seats in the courtroom for the white people? A. I didn't reserve any seats for anyone.

Q. Was there any seats in the courtroom reserved for the whites then? A. No, sir, His Honor—

The Court: I will answer that from the bench. I reserved one-half of what was formerly the white
(343)
section for white people and I gave the other half of it to the colored people.

WITNESS EXCUSED

The Court: Captain Thompson.

HERMAN A. THOMPSON, called as a witness by the Court, being first duly sworn, testified as follows:

Direct examination by the Court:

Q. How many colored people were out in the hall at the time court started on Monday? A. There were two hundred or better, Judge.

Q. Is that your estimate? A. Yes, sir, that was why we called the fire marshals.

Q. Could it have been as many as 250? A. It could very easily.

Q. Could it have been more than 250? A. They were solid from this courtroom door about four foot out from the door down to the Grand Jury room, and there were some of them sitting on benches down the hall.

Q. Did you clear a corridor between them for a passage-
(344)
way to the door here? A. We were having difficulty. That is why we called the fire marshals in order to enforce the fire laws.

Q. How long did a crowd of that size remain outside? A. I would say for at least two hours.

By Mr. Pitcher:

Q. Captain, at the time there were 250 people in the hall, was that the same time that Captain Edwards has said there were 127 in the courtroom? A. That is correct, sir.

Q. And there were only eight white people in it at that time? A. That is correct, sir.

Mr. Pitcher: That's all. Your witness.

A. (Directed to the Court) Do you want what you asked for yesterday?

By the Court:

Q. What is that? A. You asked how many vacant seats there were.

Q. What time was it? A. At 11:15 A. M. yesterday you asked me and there were twenty vacant seats and only five waiting outside, and out of the five we asked—one was Reverend Johnson and he said he didn't care to come in.

July 7, 1965

Federal Court action to restrain Baton Rouge District Attorney from further prosecuting Cox.

cr

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 22,657

REV. B. ELTON COX,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

On Motion for Stay Pending Appeal from the United States District Court for the Eastern District of Louisiana.

(June 29, 1965)

Before HUTCHESON, BROWN, and WISDOM, Circuit Judges.

PER CURIAM:

The Reverend B. Elton Cox, defendant in a criminal cause pending in the 19th Judicial District for the Parish of East Baton Rouge, Louisiana, removed the cause to the United States District Court for the Eastern District of Louisiana, Baton Rouge Division. The district court remanded the cause to the state court. Cox applied to this Court for a stay of the remand order pending his appeal of the order. We find that the petition states a good claim for removal under 28 U.S.C. § 1443(1). We grant the stay.

The allegations of the petition for removal must be accepted as true for purposes of determining whether the petition states a good claim for remand. These allegations show a "planned prosecutorial abuse of a [state criminal] statute".[1]

In 1961 Cox, a Negro minister active in the civil rights movement, was arrested the day following a civil rights demonstration in Baton Rouge. The State indicted Cox on a number of charges, one of which was that he had obstructed justice by demonstrating near the courthouse in violation of Louisiana law.[2] LSA - R.S. 14:401. The United States Supreme Court reversed all of the convictions. Cox v. Louisiana, 1965, 379 U.S. 559, , 85 S. Ct. , , 13 L.Ed.2d 487, .

As the petition sets forth, in 1965, shortly after the Supreme Court decided Cox v. Louisiana the district attorney for the Parish of East Baton Rouge, Louisiana, filed in the original proceeding a new bill of information against Cox, this time charging him with "attempting" to obstruct justice. The bill is based on the identical conduct that in 1961 led to the arrest and conviction of Cox on the charge of "obstructing justice".

In Cox v. Louisiana, the Supreme Court set aside this conviction on the ground that it violated due process of law. The Court found that the "record here clearly shows that the [police and city] officials . . . gave permission for the demonstration to take place across the street from the courthouse". The Court stated emphatically that nothing in its opinion should be "interpreted as sanctioning riotous conduct in any form". There "can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create". But, on the merits, "under circumstances present in this case, appellant's conviction cannot be sustained"; the police and city officials were guilty of "an indefensible sort of entrapment".

In the teeth of this holding, the district attorney is renewing the charges against Cox. The State now seeks to prosecute the

petitioner for the alleged crime of "attempting" to do what the Supreme Court, on the merits, decided was not a violation of the law.

~~Taking the allegations of the petition as true,~~ The second prosecution is without any hope of success. The district attorney's transparent purpose is to harass and punish the petitioner for his leadership in the civil rights movement, and to deter him and others from exercising rights of free speech and assembly in Louisiana -- in this instance, by advocating integration of public accommodations.

A civil complaint asserting such an abuse of the prosecutorial function would state a claim under the Civil Rights Act, 42 U.S.C. § 1983 and justify injunctive relief. Dombrowski v. Pfister, 1965, 380 U.S. 479, 85 S.Ct. [3], 14 L.Ed.2d 22. This is not a Douglas v. Jeannette, Stefanelli, or Cleary v. Bolger situation. [4] Here the State, through the Parish District Attorney, under the guise of protecting the administration of justice, is challenging the Nation on a national policy expressed in the Constitution, carried out by Congress, and validated by the Supreme Court.

The general principle, basic to American Federalism, that United States courts usually should refrain from interfering with state courts' enforcing local laws is unassailable. But the sharp edge of the Supremacy Clause cuts across all such generalizations. When a State, under the pretext of preserving law and order uses local laws, valid on their face, to harass and punish citizens for the exercise of their constitutional rights or federally protected statutory rights, the general principle must yield to the exception: the federal system is imperiled.

This Court, in many different contexts, has faced up to the reality that a narrowly drawn, non-discriminatory,

apparently constitutional criminal law, or other local law, or rule of court, may have been designed to provide a subtle means of discrimination or may be subverted by being unconstitutionally applied. Prompt access to the federal court may be the only relief that will make meaningful to the individual the rights placed in jeopardy.[5] Moreover, the effect of arrest and prosecution and perhaps a long sentence unfitted to the crime will extend far beyond the individual defendant.[6] In these circumstances there is no basis for the application of comity as a principle of federalism.[7] And no reason for a court to be bound by obsolete standards for determining discrimination prevailing at the time the early removal cases were decided.[8]

In the context of the removal statute, Section 1443, two recent decisions of this Court are squarely in point and control the instant case, Rachel v. State of Georgia, 5 Cir. 1965, 342 F.2d 336, and Peacock v. City of Greenwood, 5 Cir. 1965, F.2d , (June 22, 1965).

Rachel involved prosecutions of sit-in demonstrators under a Georgia anti-trespass statute. The statute was valid on its face and there was no showing that the defendant would not have a fair trial in the Georgia courts. Relying on Hamm v. City of Little Rock, 1964, 379 U.S. 306, 85 S.Ct. 384, L.Ed.2d , we allowed removal under Section 1443(1) on the ground that the effect of prosecuting the demonstrators under the statute would be to deny their civil rights, contrary to a congressional statute, the Civil Rights Act of 1964. Their conduct was federally protected. Judge Tuttle, for the Court, said:

> "Congress, while carving out rights and immunities in the area of civil rights, has provided a jurisdictional basis for efficiently and appropriately protecting those

rights and immunities in a federal forum. The provision of this protective forum is not limited by the States' obligation, under the Supremacy Clause, to protect federally guaranteed civil rights as zealously as would a federal court. That there is such an obligation on State tribunals is true, and vital, but it is irrelevant here. Theoretically, there is no need for any federal jurisdiction at all--except that of the Supreme Court--because State courts are required to protect federally created rights. Nevertheless, the power of Congress to provide a federal forum also to protect such rights is undoubted. Such power was exercised in enacting § 1443(1)."

Peacock extended the Rachel principle to a state statute discriminatorily applied, contrary to the United States Constitution. In Peacock the defendants were charged with obstructing public streets in violation of a narrowly drawn Mississippi statute valid on its face. We held that the petition stated a good claim for removal on the ground that if the statute were being applied as alleged, convictions under the statute would violate the equal protection clause. Judge Bell, for the Court, said:

"The rationale of Rachel is inescapably applicable here, since both cases involve the denial of equal rights through statutory application, rather than through some informity appearing on the face of the state statute. . . . In short, we do not read [Kentucky v. Powers and other early] cases as establishing that the denial of equal civil rights must appear on the face of the state constitution or statute rather than in its application where the alleged denial of rights, as here, had its inception in the arrest and charge. They dealt only with the systematic exclusion question, a question which in turn goes to the very heart of the state judicial process, and federalism may have indicated that the remedy in such situations in the first instance should be left to the state courts. We would not expand the teaching of these cases to include state denials of equal civil rights through the unconstitutional application of a statute in situations which are not a part of the state judicial system but which, on the contrary, arise in the administration of a statute in the arresting and charging process. . . . We therefore hold that a good claim for removal under § 1443(1) is stated by allegations that a state statute has been applied prior to trial so as to deprive an accused of his equal civil rights in that the arrest and charge under the statute were effected for reasons of racial discrimination. . . . However, we deal here only

with what allegations are sufficient to prevent remand without a hearing. . . . It follows that the District Court erred in remanding these cases to the state court without a hearing."

Cox's petition presents a strong case for removal. Once over the hurdle of the city and police officials' approval of the location of the demonstration, Cox's conduct was protected by the Civil Rights Act, as in Rachel, and by the equal protection clause of the Constitution, as in Peacock. What makes Cox's petition particularly strong is that apparently the parish district attorney is deliberately attempting to frustrate the protective mandate of the United States Supreme Court. This case therefore presents a sharper challenge to the Supremacy Clause than Rachel and Peacock presented. In addition, in the Georgia cases there was no indication of a prosecution in bad faith and no showing that the defendants would be unable, as Cox alleges, to vindicate their rights in the state courts.

9

There is a common denominator in Rachel, Peacock, and Cox: the defendants, as a result of their actions in advocating civil rights, are being prosecuted under statutes, valid on their face, for conduct protected by federal constitutional guarantees or by federal statutes or by both constitutional and statutory guarantees. In essence, these guarantees rest on national citizenship, as opposed to state citizenship, not expressly recognized until the three Civil War amendments.

10

In Rachel, Peacock, and Cox, and in similar cases, there is no federal invasion of states' rights. Instead, there is rightful federal interposition under the Supremacy Clause of the Constitution to protect the individual citizen against state invasion of federal rights.

- - - -

HUTCHESON, Circuit Judge, Concurring Specially: I concur in the result.

REV. B. ELTON COX v.
STATE OF LOUISIANA
NO. 22657

FOOTNOTES

1/ So Justice White describes another prosecution ~~condemned in~~ Dombrowski v. Pfister, 1965, 380 U. S. 479, 85 S.Ct. , 14 L. Ed. 2d 22. Cameron v. Johnson, 1965, 33 L.W. 3395,3397. (Dissenting opinion).

2/ The Reverend B. Elton Cox led a civil rights demonstration in Baton Rouge in December 1961 to protest the arrest of 23 students who had picketed stores maintaining segregated lunch counters. In Cox v. Louisiana, 379 U. S. 559, the Supreme Court described the demonstration as "an orderly and peaceful march" to a street across from the courthouse in Baton Rouge. The Court noted that the city officials gave permission for the demonstration. When Cox started to make a speech however the Chief of Police, considering the speech inflammatory, ordered the demonstrators to disperse. When the crowd did not disperse quickly enough, the police exploded tear gas bombs. The Supreme Court noted that the demonstration was orderly until the police exploded the tear gas bombs. None of the demonstrators were arrested at the time but the next day Cox was arrested and charged with criminal conspiracy, disturbing the peace, obstructing public passages, picketing before a courthouse, and obstructing the administration of justice.

Cox was tried before a judge without a jury. He was convicted of all but the criminal conspiracy charge. The Louisiana Supreme Court affirmed. The United States Supreme Court set aside the convictions, principally on the ground that the convictions infringed Cox's rights of free speech and assembly. The Court held that Cox did not, in fact, engage in any conduct which the State could prohibit as a breach of the peace. Cox v. Louisiana, 379 U. S. 559, 85 S. Ct. , 13 L.Ed.2d 471, 487 (two cases). Second, the breach of peace statute, on its face, was "unconditionally vague in its overly broad scope". As to the conviction for obstructing public passages, the Court held that an appropriate statute giving officials a limited discretion would have been proper, but it was "clearly unconstitutional" to allow "unfettered discretion in local officials". The court held that the convictions for obstructing justice violated the due process clause because the "uncontradicted evidence" showed that the city officials were guilty of "an indefensible sort of entrapment" in that they told the demonstrators that they could meet where they did.

3/ Justice White, commenting on Dombrowski, has said: "Where threats of enforcement are without any expectation of conviction and are 'part of a plan to employ arrests, seizures, and threats of prosecution under color of statutes to harass,' it is obvious that defense in a state criminal prosecution will not suffice to avoid irreparable injury. The very prosecution is said to be a part of the unconstitutional scheme and the scheme, ~~xxxxx~~ including future use of the statutes, are quite irrelevant to the prosecution in the state courts." Cameron v. Johnson, 1965,

per curiam, 33 L.W. 3395, 3397. (Dissenting opinion). Justice Black, who also dissented, observed: "Dombrowski also indicates to me that there might be cases in which state or federal officers, acting under color of a law which is valid, could be enjoined from engaging in unlawful conduct which deprives persons of their federally guaranteed statutory or constitutional rights." Compare 17 Stat. 13, 42 U.S.C. § 1983 (1958 ed.).

4/ Douglas v. City of Jeannette, Pa., 1943, 319 U.S. 157, 63 S. Ct. 877, 87 L. Ed. 1324; Stephanelli v. Minard, 1951, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138; Cleary v. Bolger, 1963, 371 U. S. 392, 83 S. Ct. 385, 9 L.Ed.2d 390.

5/ The Jackson Freedom Riders spent four years in state courts attempting to overturn their convictions, despite the fact that the Supreme Court had previously declared the arrests patently unconstitutional. Bailey v. Patterson, 1962, 369 U. S. 31, S.Ct. , L.Ed.2d .

6/ In United States v. Wood, 5 Cir. 1961, 295 F.2d 772, cert. den'd 362 U. S. 850, a leader in a Negro voters registration campaign was arrested, without cause, for breach of the peace. We asked, "The question then arises how the arrest and prosecution of Hardy can irreparably injure these other citizens [potential] Negro voters in the county], if we must assume that, Hardy will receive a fair trial and that his acquittal is a possible result". We answered, "that the prosecution of Hardy, regardless of outcome [favorable to Hardy] will effectively intimidate Negroes [generally] in the exercise of their right to vote in violation of 42 U.S.C. § 1971". We pointed out that the "legislative history of section 1971 would indicate that Congress contemplated just such activity as is here alleged -- where the state criminal processes are used as instruments for the deprivation of constitutional rights." 295 F.2d 781.

7/ See Dilworth v. Riner, 5 Cir. 1965, F.2d , and cases cited.

8/ For example, Kentucky v. Powers, 1906, 201 U. S. 1, S.Ct. , 50 L.Ed. 633, limiting Section 1443(1) to cases where the denial of equal rights appeared on the face of a state constitution or statute. See discussion in Rachel and Peacock. Cf. New York v. Galamison, 2 Cir. 1964, F.2d , cert. den'd U.S. , dealing, however, primarily with section 1443(2).

9/ The petitioner alleges:

"Petitioner is unable to enforce his federal rights in the state courts of Louisiana and particularly in the 19th Judicial District Court, because those courts are hostile to petitioner by reason of race and his civil rights' activity and by reason of the commitment of those courts to enforce Louisiana's

Cont'd - Footnotes #9

policy of racial discrimination. In the District Court for East Baton Rouge Parish where Petitioner will be tried:

(a) District Court Judges are elected for terms of four years at elections at which Negroes have been systematically denied the right to vote by reason of race in violation of the Fifteenth Amendment.

(b) Negroes are systematically excluded from the juries by reason of race.

(c) Criminal defendants charged with offenses arising out of demonstrations and other exercise of their equal civil rights have usually been held to answer under excessive and exorbitant bail and if convicted maximum imposition of sentence is imposed.

(d) Negro defendants, Negro witnesses and Negro attorneys are addressed by their first names, as a mark of contempt and racial discrimination in violation of the Equal Protection Clause.

(e) The Court sits in a community which is hostile to and inflamed against Negroes and, in particular, hostile to and inflamed against persons like petitioner who actively exercise his federal constitituional rights by working in a lawful and peaceful manner to achieve the equal rights of Negroes and of all persons within the State of Louisiana and the United States."

10/ See Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. of Pa. L. Rev. 793 (1965).

JUN 29 1965

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By [signature] Deputy

New Orleans, Louisiana

United States Court of Appeals

FOR THE FIFTH CIRCUIT

I, EDWARD W. WADSWORTH, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing TEN pages, numbered from one to ten, inclusive, contain a true copy of the opinion order granting stay pending appeal

in the case of

Rev. B. Elton Cox

No. 22657 *versus*

State of Louisiana

as the same remains upon the files and records of said United States Court of Appeals.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Court of Appeals, at the City of New Orleans, Louisiana, this 29th day of June, A. D. 19 65

EDWARD W. WADSWORTH
Clerk of the United States Court
of Appeals for the Fifth Circuit
By [signature]
Deputy Clerk.

Points in Rebuttal

Statement of the case

p. 3 "Loud and frenzied outbursts" and "wild yells" - taken from La. Sup. Ct. statement. Record does not support this. Feelings of onlookers are irrelevant.

no reference in Edwards to Sup Ct's

Point I Peaceful Demonstration not protected without regard to Place

a. It is always protected, though it may be open to state regulation to prevent c & p danger to a substantial interest of the state.

b. Concede that in a proper case the state may regulate the place and time.

I. But this is not that case

a. The statutes are not narrow statutes. 103.1 covers all breach of the peace, 100.1 concerns every sidewalk, 401 every demonstration near a courthouse. Plainly the first is too vague by any standard, the other two must be limited to particular cases to which

they may be constitutionally applied.

b. This is not a case presenting any clear and present danger which could be included in a regulatory statute.

i. Schneider, p. 5 lists a "Parade of imaginary horribles", none of which happened in this case.

ii. The S. Carolina cases are not distinguished properly. In Fields & Henry Traffic & Work were disturbed by peaceful demonstrations but the statutes were not specifically directed to those evils, therefore struck down.

iii. Here also there was a peaceful demonstration, which did indeed crowd a sidewalk;

But, the point (of the S. Carolina cases) is that such a demonstration is protected except in specially defined cases. State may not pass statutes simply to prevent congregation on the sidewalk. The brief says p. 8 "The

activity of appellant here bears no necessary relationship to the freedom to speak or assembly." Appellant maintains that it does bear such a relationship. Street demonstrations are, under the present circumstances, necessary way of expressing speech and assembling to petition for redress of grievances.

The passage on p. 8, is the essence of Louisiana's case, and it is contrary to the law.

Point II 103.1 (Breach of Peace) not unconstitutional on its face.

a. Does not have a fixed meaning.

i. It is as vague as the law in the South Carolina cases i.e. common law meaning of breach of peace.

b. Meaning assigned by the lower court and La. S. Ct. includes const. protected speech, therefore it is unconstitutional as applied.

Point III 100.1 Obstructing sidewalk. "Wilfully" is defined in such a way that it includes every assembly on the sidewalk. True the La. S. Ct. found the will was proved, but that will, as defined, included const. protected conduct.

Point IV Demonstration near Courthouse

a. pp. 12-16 The point made by La. is that demonstration is not like publication, demonstration (e.g. picketing) does not get same protection as publication, therefore a statute which prevents demonstration in front of courthouse contains a valid standard. But this ignores the fact that the demonstration here was peaceful, did not occur at time of trial. La. is in effect saying that every demonstration near a courthouse to protest an arrest is a crime. This is obviously wrong.

b. Intent. We contend not only that there is no evidence to convict, but that the definition of intent used by the La. S. Ct. included constitutionally protected activity.

That court so loosened the meaning of "obstruction of justice" or "influence", that any peaceful demonstration will be enough to prove them.

Point V Discriminatory Administration.

There is proof of discriminatory administration. Cite the examples from Bryan Clemmons.

Point VI Segregated Courtroom.

Appellant does not rely on the Johnson case. Johnson left open the question whether segregation in courtroom was denial of equal protection or fair trial to a Negro, or a Negro C.R. worker tried in the courtroom. We maintain:

a. It affects the minds of witnesses and trier of fact in every case involving a Negro. A badge of inferiority.

b. In a case of speech against segregation, indicates prejudice on the part of the trier of fact. Affects decision re c & p danger.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

FEB 16 REC'D

February 12, 1964

Carl Rachlin, Esquire
165 West 46th Street
New York, New York 10007

RE: Cox v. Louisiana, No. 24, October Term, 1964

Dear Mr. Rachlin:

The mandate of this Court in the above-entitled case has been mailed today to the Clerk of the Supreme Court of Louisiana.

Your client is given recovery for costs in this Court as follows:

Clerk's costs $100

This amount may be collected through the Supreme Court of Louisiana or direct from opposing counsel or parties.

Very truly yours,

JOHN F. DAVIS, Clerk

By Evelyn R Limstrong

(Mrs) Evelyn R. Limstrong
Assistant

File

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

AUG 13 REC'D

August 12, 1964

Carl Rachlin, Esq.
165 West 46th Street
New York, New York

RE: COX v. LOUISIANA, No. 24;
COX v. LOUISIANA, No. 49;
OCT. TERM, 1964

Dear Mr. Rachlin:

Counsel in the above-entitled cases should be present on Wednesday, October 21st, for the oral argument. Kindly advise immediately who will present the oral argument for the appellant in these cases.

Very truly yours,

JOHN F. DAVIS, Clerk
By E. P. Cullinan

E. P. Cullinan,
Chief Deputy.

Encl.
EPC:ht

Answer — if we have from CD+ & final

esk of
Douglas
y

Cox case

MAY 27 1964 File - Cox Case

Carl

— you have many things to worry and am ing if anything done to join Cox Case the previous 2 U.S. Supreme Ct.

File Cox Cases

NOTICE TO COUNSEL

Cases are not assigned for a day certain nor are they called until actually reached for argument. The Clerk informs counsel as to the day they must be present and the case upon which they are in attendance is usually heard that day or the following day.

The Court convenes at 10 a. m. and, except on Mondays when there may be opinions or orders to be announced, the argument of cases begins immediately after admission of attorneys to practice.

The names of counsel who will argue and the order in which they will appear, if more than one on a side, should be given to the Clerk as soon as determined. Those who will argue must register with one of the clerks in Room 102 prior to entering the Court Room to await the call of their case. Identification cards will be issued authorizing occupancy of the tables directly behind Counsels' tables when argument in the preceding case begins. Counsel should remain seated at these tables while the preceding case is being argued.

In cases on the Summary Calendar but one counsel may argue on each side and his time is limited to one-half hour. In other cases the time is one hour for each side and two counsel are permitted to speak although divided arguments are not favored. (Rule 44.)

Signal lights on the lectern are employed to inform counsel when time has expired. A white light appears when five minutes remain and a red light when time has expired. The red light alone indicates the arrival of the 12 to 12:30 luncheon recess and the 2:30 adjournment. When counsel desire to save time for rebuttal or when time is to be prorated in the case of a divided argument arrangement may be made with the Marshal, prior to the time case is called, to have an appropriate signal flashed at a specified time. Where counsel have agreed to a division of the time for argument, the use of more time by one attorney does not extend the total time allotted. Inquiry should *not* be made of the Chief Justice as to amount of time remaining.

Counsel in cases being argued at or after the luncheon recess may make luncheon arrangements with the Marshal before 11 o'clock.

Admissions to the Bar are entertained each day the Court is in session. If not previously admitted counsel who plan to argue may be admitted on the day their case is heard provided the necessary application papers have been filed and approved. JOHN F. DAVIS, *Clerk.*

DISTRICT ATTORNEY
NINETEENTH JUDICIAL DISTRICT
OF LOUISIANA

SARGENT PITCHER, JR.
DISTRICT ATTORNEY

PARISH COURT HOUSE
BATON ROUGE, LOUISIANA

SEP 25 REC'D

September 21, 1964

C

O

P

Y

Clerk
United States Supreme Court
Washington, D.C.

Re: Nos. 24 and 49
B. Elton Cox, Appellant
Vs.
State of Louisiana, Appellee

Dear Sir:

Under separate cover we are mailing this date forty copies of brief on behalf of the State of Louisiana, Appellee.

We enclose herewith Proof of Service.

Thanking you in advance for your assistance and cooperation, I am

Very truly yours,

Ralph L. Roy
Assistant District Attorney

RLR:rtd

Enclosure

B. ELTON COX : NUMBERS 24 and 49

VERSUS : UNITED STATES SUPREME COURT

STATE OF LOUISIANA

::::::::::::::::::::::::::::::::::

PROOF OF SERVICE

I, Ralph L. Roy, Assistant District Attorney for the Nineteenth Judicial District of Louisiana, one of the attorneys of record for the State of Louisiana, Appellee, herein certify that on the 21st day of September, 1964, I served a copy of the foregoing brief by mailed same, postage prepaid, to the counsel of record for appellant at the following addresses:

Carl Rachlin, 280 Broadway, New York, New York

Robert Collins, 2211 Dryades Street, New Orleans, Louisiana

Nils Douglas, 2211 Dryades Street, New Orleans, Louisiana

Lolis Elie, 2211 Dryades Street, New Orleans, Louisiana

Ralph L. Roy, Counsel of Record
for Appellee

9/28

Carl:

Errata to Cox brief. This is a draft for your considerations in regard to additions or corrections. They really messed it up, and it's a shame

All the best,

Paul Alevizos

By Hand

October 5, 1964

Mr. Bradley Brewer
1 Chase Manhattan Place
New York, N.Y.

Dear Mr. Brewer,

Enclosed is the brief which you were kind enough to say you could have copied in your office. I have calculated that it would require fourteen pages: one for the cover, one for the index, and one for each two pages after that, if the booklet is opened out flat. Enclosed is $2.80 in cash to pay for having two copies made.

As soon as I speak with Mr. Rachlin, I'll ask him to confirm your luncheon appointment for Wednesday.

Thank you again for helping us out with the copies of the brief.

Very truly yours,

Hannie de Leeuw
Secretary to Carl Rachlin

Enclosures/

October 9, 1964

Hon. John F. Davis
Clerk United States Supreme Court
Supreme Court
Washington, D.C.

Re: Cox v. Louisiana Nos. 24 and 49

Dear Mr. Davis,

Unhappily, the printer in the above entitled cases did not submit a proof for correction to us, nor did we know whom the Court had selected as the printer so as to be able to request a proof.

As a result there are certain typographical errors in the brief which we submit herewith.

We are appreciative of the fact that the Court granted our motion to proceed in forma pauperis and we regret the inconvenience caused by the enclosed errata.

Very truly yours,

Carl Rachlin
General Counsel

Enclosure

cc: Hon. Jack P. F. Gremillion
Hon. Sargent Pitcher, Jr.
Nils Douglas, Esq.
Paul Chevigny, Esq.

CR:hdl

October 9, 1964

Nils Douglas, Esq.
Collins, Douglas & Elie
2211 Dryades Street
New Orleans, La. 70113

Dear Nils,

Re: Cox v. Louisiana

Would it be possible for you to find out whether the fellows who were picketing and arrested, thus causing the massive demonstration from Southern University, were ever tried or what has happened to their cases? I have a hunch they were never tried. If this is so, we ought to advise the Supreme Court of this.

Enclosed is copy of a letter to the Clerk of the Supreme Court, together with the errata in Brief of Appellant, as well as a copy of the Consolidated Brief for Appelle.

I look forward to seeing you.

Kindest regards,

Carl Rachlin
General Counsel

Enclosures/

CR:hdl

file

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

OCT 21 RECD

October 20, 1964

Carl Rachlin, Esq.
165 W. 46th Street
New York, N. Y. 10007

RE: COX v. LOUISIANA
Nos. 24 and 49, October Term, 1964

Dear Mr. Rachlin:

Confirming our telephonic conversation of today, I find that the errors appearing in your brief in the above-entitled cases were not printing errors, and I regret the facilities of this office will not permit the making of 800 corrections.

Very truly yours,

JOHN F. DAVIS, Clerk

By

E. P. Cullinan
Chief Deputy

EPC:jmh

M E M O R A N D U M

CONGRESS OF RACIAL EQUALITY
38 Park Row, New York, N.Y.10038

October 30, 1964

TO: CORE Chapter Chairmen

FROM: Carl Rachlin, CORE General Counsel

RE: Cox v. Louisiana

Last week General Counsel, in association with our counsel, Nils Douglas, of the New Orleans law firm of Collins, Douglas & Elie, and Paul Chevigny of New York, presented argument to the United States Supreme Court on several important cases involving mass demonstrations in Baton Rouge, La.

Two novel questions were presented to the Court which may be of interest to you:

(1) The Supreme Court was asked to reverse the conviction of CORE Staffer, the Rev. B. Elton Cox, based upon the fact that the Louisiana State judge refused to desegregate the courtroom when trial counsel applied for such desegregation. It was our argument that a segregated courtroom during the course of a trial involving the issues of segregation and discrimination became a denial of due process of law and so a violation of the Fourteenth Amendment.

The Supreme Court had previously considered the question of whether a spectator in a courtroom who refuses to sit in a segregated part of the court can be punished for contempt (the U.S. Supreme Court said "No" in Johnson v. Virginia); similarly, whether a witness during a trial who refuses to answer unless she is addressed in a dignified manner can be punished for contempt by her refusal. Here again the Supreme Court said "No" in reversing the conviction of CORE Staffer Miss Mary Hamilton.

Our question, however, goes further and to the very essence of whether it is possible to have any kind of fair trial in a segregated courtroom.

(2) The second issue concerns the conviction under a Louisiana statute making it illegal to conduct a demonstration in or near a courthouse and is commonly referred to as "Obstructing Justice Law." Several states, and the United States itself, have statutes on this, but never before has this question reached the Supreme Court. Thus both these issues are what we lawyers call matters of "first impression."

It is possible that the Supreme Court will not decide these questions because it may decide in our favor on the basic facts. In my view these facts are very favorable to us and, I hope, to the Court. Should the Court do this and reverse in our favor on the ground the police had no right to make the arrests, it will not have to answer these questions, novel and interesting as they are.

(cont'd)

October 30, 1964

The majority of you have still not given us the name of your local attorney. It is important that we be advised of the course of cases you are involved in so that

(a) we can help advise with local counsel, and

(b) assist in preparing briefs and other legal papers, and

(c) if necessary, appear with local counsel in court, as we do frequently.

More and more as CORE grows and as its dynamic programs continue, we will be making the law in this field and it is important that the National Office be kept advised of your problems.

By the way, send us any news clippings that relate to cases where CORE members or the CORE Chapter is involved.

Fraternally yours,

Carl Rachlin
General Counsel

CR:hdl

November 5, 1964

BY REGISTERED MAIL

United States Supreme Court
Washington, D.C.

Attention: Mr. Cullinan, Chief Deputy Clerk

Dear Mr. Cullinan,

Re: Cox v. Louisiana

Enclosed are the following exhibits in the envelope of the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, in the case of Louisiana v. Cox, No. 42,199-202:

State Exhibits 2, 3, 4, 5, two numbered 7, 8, 9 and 10

Defendant's Exhibit No. 1 (street diagram)

With regard to the film exhibit, this was presented by the State. Our counsel, Lolis Elie, of New Orleans, with whom we spoke today, tells us that he has been in touch with Mr. Roy, and presumably he will send you the film.

Very truly yours,

Hannie de Leeuw

Hannie de Leeuw
Secretary to Carl Rachlin,
General Counsel

Enclosures/

HdL:h

November 13, 1964
(dictated Nov. 12)

Nils Douglas, Esq.
Collins, Douglas & Elie
2211 Dryades Street
New Orleans, Louisiana

Dear Nils,

In reply to your letter of the 9th inst. regarding the Cox cases, my inclination is to two trials rather than one. I hate to sound stuffy but the proof might well be different as to the judge compared with the proof as to Pitcher. We owe Cox this since possibly (very remote) the proof as to one may even be legally insufficient within the context of the statute, regardless of constitutional issues.

In any event, I will be in New Orleans Sunday night (Eastern flight #505 arriving 7:09; let's have a party) and we can go over this further.

By the way, two fellows are working on the Monroe library case. Would it be possible, do you think, to extend December 4th for a few weeks? It is kind of short.

Regards,

Carl Rachlin

COLLINS, DOUGLAS & ELIE
ATTORNEYS & COUNSELLORS AT LAW
201 DOUGLASS LIFE INSURANCE BUILDING
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA 70113

NOV 10 1964

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE

November 9, 1964

TELEPHONE
523-5197

Carl Rachlin, Esq.
38 Park Row
New York 38, New York

Dear Carl:

I would like to get your opinion as to the specific advantages and disadvantages of trying the two Cox cases together.

Respectfully,

COLLINS, DOUGLAS & ELIE

BY: NRD/v

NRD/vmg

WESTERN UNION

TELEGRAM

W. P. MARSHALL, PRESIDENT

(53) 201 (4-60)

SYMBOLS
DL = Day Letter
NL = Night Letter
LT = International Letter Telegram

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CARL RACHLIN =
165 WEST 46 ST NYK =

JAN 18

JUDGMENTS COX AGAINST LOUISIANA CASES 24 AND 49 REVERSED TODAY AND CASES REMANDED OPINION AIRMAILED =

JOHN F DAVIS CLERK =

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

N.Y. Times

JANUARY 19, 1965.

In The Nation

Another Court Sanction for Mobocracy

By ARTHUR KROCK

WASHINGTON, Jan. 18—Having recently proclaimed a new public policy in the Southern sit-in cases —that due penalties for acts which were illegal when committed shall not be enforced because the acts were legalized thereafter—the Supreme Court majority today consistently tortured another law to expand its protections of violations of local public order in the name of racial equality. It did this by upholding the appeal of the Rev. B. Elton Cox from a 1961 conviction under a Louisiana law.

Cox had taken command of a group of 2,000 who were demonstrating "near" the Baton Rouge courthouse in protest against what they considered the "illegal" arrest of 23 Negro college students, incarcerated in the building for picketing stores which maintained segregated lunch counters. The Supreme Court majority today agreed that the demonstration was located where it was to influence the courts and peace officers of Baton Rouge to release the prisoners. All were in agreement also that a Louisiana statute, patterned on a 1949 act of Congress, prohibits such an activity "in or near a building housing a court."

The problem for the Supreme Court majority, then, was to find a judicial basis for the particular defiance of this statute that was led by Cox, without voiding the state law or its Federal model. Justice Goldberg proved equal to the task. To do so he employed the following rationale:

The chief of police of Baton Rouge, harassed like all his kind by trying to carry out his duty to enforce the laws against public disorder, and at the same time keep from running afoul of the Supreme Court, had informed the demonstrators as they reached the vicinity of the courthouse to confine themselves "to the west side of the street," which was 101 feet from the courthouse. Justice Goldberg concluded that Cox and his followers properly considered this "official permission" to demonstrate there, and hence an official interpretation that 101 feet from the courthouse was not "near" in the meaning of the statute.

"After the officials acted as they did," summed up Justice Goldberg for the majority, "to sustain [Cox's] later conviction for demonstrating where they told him he could . . . would be to sanction an indefensible sort of entrapment by the state." Moreover, disapprovingly wrote the majority's deft spokesman, "it is clear that the statute, with respect to the determination of how 'near' the courthouse a particular demonstration can be, forebees a degree of on-the-spot administrative interpretation by officials charged with administering and enforcing it."

As proof that this latitude was subject to abuse, he ruled that on-the-spot interpretation infringed Cox's constitutional rights; therefore, the contrary ruling of the Louisiana courts must be reversed on the "near-the-courthouse" conviction.

The Dissenters

The following extracts from opinions of 2 of the 4 justices who dissented to the ruling provide ample ground for the judgment that the majority of 5 today tortured another law to fit the public policy the Court initiated in the public school cases in 1954:

"I fail to understand," wrote Justice Black, "how the Court can justify the reversal of these convictions because of a permission which testimony in the record denies was given, which could not authoritatively have been given, anyhow, and which even if given was soon afterwards revoked. . . . Government under the law as ordained by our Constitution is too precious, too sacred, to be jeopardized by subjecting the courts to intimidatory practices . . . fatal to individual liberty and minority rights. . . ."

"I have always been taught," wrote Justice Clark, "that this nation was dedicated to freedom *under law*, not under mobs, whether they be integrationists or white secessionists. . . . For the Court to place its imprimatur upon [mobocracy] is a misfortune that those who love the law will always regret."

The imprimatur was given nevertheless. And also despite the facts that the location of Cox and his demonstrators was "near" enough the courthouse to create turmoil in the whole area and impel one judge to suspend his work and leave the building.

January 20, 1965

The Editor
The New York Times
229 West 43rd Street
New York, New York

Dear Sir:

As counsel who argued the appeal of CORE Field Secretary, the Rev. B. Elton Cox before the United States Supreme Court in the cases entitled Cox v. Louisiana, we feel impelled to take issue with the description and analysis of those cases which Arthur Krock presented to the readers of the New York Times in his column of January 19th.

Without having sufficiently apprised himself of the facts of the case, Mr. Krock criticizes Mr. Justice Goldberg, and the Supreme Court, and takes them to task on assumptions not warranted by the record. Not having examined the facts of the case, a discussion and criticism of the law, as any lawyer can advise, is often dangerous and misleading.

Whether or not the police authorities who arrested the Rev. Mr. Cox violated the U.S. Constitution by interpreting three Louisiana statutes in such a way as to infringe upon the right of Mr. Cox to freedom of speech, and the rights of some 2000 student demonstrators who followed him to the vicinity of the Courthouse Building, which also houses other public offices, to petition peacefully against the arrests, illegally made, of peaceful demonstrators the day before, were the issues decided by the Court.

As the record shows, at all times this demonstration was peaceful and orderly. No indication that any violence might result from any of the acts of the demonstrators was seen, nor did any in fact occur. Repeatedly Mr. Justice Goldberg emphasizes these pertinent facts. Never was it a mob, as Mr. Krock insinuates, but a well-led peaceful protest.

Gathering precisely where police officials indicated, remaining there peacefully at all times, whatever disorder occurred resulted from the illegal and imprudent use of tear gas against the students by the police.

Prior to the demonstration the police were informed that it would take only a few minutes, and would consist of a few songs,

./.

January 20, 1965

The Editor
The New York Times
229 West 43rd Street
New York, New York

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Prior to the demonstration the police were informed that it would take only a few minutes, and would consist of a few songs,

./.

The New York Times
New York, New York January 20, 1965

a prayer, a talk, and the singing of the National Anthem. To all this the police and the Mayor consented.

What was the purported theory behind the arrest of Mr. Cox?

1. That he had disturbed the peace in disobeying a police order to break up the orderly meeting, which order was only given when Cox suggested that the Negro students try to use the restaurants;

2. that in gathering on the sidewalk, at the place designated by the police, he, and the others, had illegally blocked it;

3. that the entire demonstration was an attempt to obstruct justice, and was in violation of a statute forbidding picketing in the vicinity of a court.

It is Mr. Krock who upholds "mobocracy" since the reason given for breaking up the meeting was the "ugly" white mob across the street. This ugly mob, abusing our Constitution, is preferred to the peaceful meeting upholding our traditions. No matter how peaceful the CORE meeting was, it would have been dispersed because it dared challenge the segregationist pattern of the area. One need only quote a few words from the trial judge: "It must be recognized to be inherently dangerous and a breach of the peace to bring 1,500 people, colored people, down in the predominantly white business district in the City of Baton Rouge and congregate across the street from the courthouse and sing songs as described to me as the CORE National Anthem. . ."

The unanimous Supreme Court concluded (1) that the demonstration was undertaken with police permission; to uphold the arrest would constitute a form of entrapment and, accordingly, these acts could not constitute breach of the peace; (2) that, once having begun the brief demonstration with official permission, the demonstrators and Rev. Cox had a right to finish it as planned; seven judges accordingly said there was no justification for the arrest for obstructing traffic; (3) that the circumstances did not justify the police attempt to break up the demonstration immediately after giving permission for it to take place (i.e., that the attempted "revocation" of permission was factually unjustified and therefore constitutionally invalid). A majority of the Court held accordingly that it was improper to convict Cox of obstructing justice.

Later the police attempted to justify the purported "revocation" on the ground that they feared violence. The majority of the Supreme Court expressed the view, urged by us, that the record of the trial discloses no facts to indicate that there was any basis for this purported apprehension on the part of the police.

./.

The New York Times
New York, New York January 20, 1965

Mr. Justice Goldberg's opinions do not "torture" constitutional law, as Mr. Krock would have his readers believe. They simply explain why the facts of these cases, and certain well-established and time-honored principles--such as freedom of speech and of assembly--require that the convictions uphald by the Louisiana Supreme Court in these cases be reversed. Justice Goldberg's opinions are well-founded in a great tradition of our constitutional law upholding the rights of American citizens to protest injustice through the exercise of freedom of speech and related civil liberties. The Court saw what apparently Mr. Krock cannot see, the sham and pretense behind the arrests; that under the pretense of maintaining the peace, the rights of Americans were being destroyed. Mr. Krock is protected by the First Amendment when he criticizes the Supreme Court in his column, no less so are the thousands of Negroes and their friends in the North and in the South protected by that Amendment when they criticize the local authorities through the means available to them. The voice of a great metropolitan newspaper is not available to millions of inarticulate Americans, but they have a right to express themselves, nevertheless.

When Mr. Krock argues that the Supreme Court should permit severe criminal penalties to be imposed because of a reasonable exercise of constitutional rights to freedom of expression and assembly, he does his profession and the rights of all Americans a grave disservice.

Very truly yours,

Carl Rachlin
General Counsel
Congress of Racial Equality

Nils R. Douglas
Collins, Douglas & Elie
New Orleans, Louisiana

CR/ND/hl

cc Nils Douglas
Dennis Rick
Brad Brewer

THE LAW

THE SUPREME COURT

New Limits for an Old Conflict

Casting a cool eye at three convictions of one Louisiana civil rights worker, the Supreme Court last week tossed out all three. In the process, it spelled out new limits for both sides of an old conflict—the need for public law and order *v.* the First Amendment's guarantee of the rights of free speech, assembly and petition.

In Baton Rouge, in 1961, police arrested 23 students of Southern (Negro) University for picketing segregated lunch counters. Next day, the Rev. B. Elton Cox, a Congregationalist minister and CORE worker, led 2,000 more students to the courthouse for a peaceful demonstration against the arrests. Cox figured he had permission because Police Chief Wingate White had told him to "confine" his demonstrators to the opposite side of the street.

When Cox urged his crew to go to segregated lunch counters, white bystanders began muttering angrily, and the sheriff ordered Cox & Co. to leave "immediately." Minutes later the demonstrators were still there, and police dispersed them with tear-gas shells.

No Standards. Cox was arrested, convicted and sentenced to four months in jail and fined $200 for breach of the peace. He got five months and a $500 fine for obstructing public passages, one year and a $5,000 fine for picketing a courthouse—all to be served cumulatively, for a total of 21 months in jail and $5,700 in fines. Louisiana's highest court upheld the convictions.

Speaking for the Supreme Court, which viewed TV news films of the entire incident, Justice Arthur Goldberg said that "the students were well-behaved throughout." What the police feared, he added, was white reaction; their paramount duty was to protect rather than attack the peaceful Negroes. Out went Cox's first conviction, by unanimous vote—along with Louisiana's "unconstitutionally vague" breach-of-the-peace statute.

In considering Cox's next case, Goldberg upheld the principle of Louisiana's obstruction-of-passage statute. "Governmental authorities have the duty and responsibility to keep their streets open and available for movement." Indeed, "we emphatically reject the notion urged by appellant" that the First Amendment protects street demonstrations just as much as pure speech. But the Louisiana statute contains no precise standards, and the way Baton Rouge police put it to work, said Goldberg, was "an unwarranted abridgment of appellant's freedom of speech and assembly." Out went the second conviction, 7 to 2.

Poisoned Justice. In reversing Cox's third conviction, however, the Justices bitterly divided, 5 to 4, over a problem that first arose when U.S. Communists picketed trials of the U.S. party's leaders. In 1949, Congress passed a law banning such demonstrations "in or near" all federal courthouses. Louisiana copied that law (as did Massachusetts and Pennsylvania) to deal with demonstrations near state courthouses. Goldberg praised Louisiana's law as "a precise, narrowly drawn regulatory statute which prohibits specific behavior." It does not violate the First Amendment, he said, because picketing is "subject to regulation, even though intertwined with expression and association." To this point at least, the court was unanimous. Then could Cox be excused?

As the majority saw it, said Goldberg, "the record clearly shows that the officials present gave permission for the demonstration to take place." Cox was then banished "because officials erroneously concluded that what he said threatened a breach of the peace." To allow the conviction to stand, he wrote, would amount to punishing the defendant for doing something he had been told was lawful.

The four dissenters completely disagreed. "If the police chief's action be consent," snapped Justice Tom C. Clark, "I never knew until today that a law enforcement official—city, state or national—could forgive a breach of the criminal laws. I missed that in my law school, in my practice, and for two years while I was head of the Criminal Division of the Department of Justice."

Clark called the decision a victory for "mobocracy." Justice Hugo Black was equally incensed. "Government under law as ordained by our Constitution is too precious," he said, "too sacred, to be jeopardized by subjecting the courts to intimidatory practices that have been fatal to individual liberty and minority rights wherever and whenever such practices have been allowed to poison the streams of justice."

Despite the dissent, however, the long-range significance of the case probably is that all nine Justices upheld Louisiana's statute against courthouse demonstrations. At the same time, they reaffirmed the First Amendment's guarantees of free speech, assembly and petition—but only to the extent that those rights are exercised in keeping with a government of laws, not men.

CRIMINAL JUSTICE

Gideon's Echoes

Clyde Harvey is an illiterate Negro farmer who roused the ire of his white neighbors in Corinth, Miss., last summer by letting civil rights workers stay in his house. While Harvey was out, police entered his home, found two cans of beer and what Harvey called "a little whisky in a jar." He was arrested without a warrant and charged with "possession of whisky," a Mississippi misdemeanor punishable by a fine of up to $500 and up to 90 days in jail.

KEN ARMSTRONG



COX AND DEMONSTRATORS OPPOSITE BATON ROUGE COURTHOUSE
The record shows officials gave permission to bend the law.

Harvey thought he was being charged only with having the beer, pleaded guilty, and was sentenced *in absentia* to the full whisky rap. He did not learn about the sentence until he was jailed —eight days after the statutory time limit had passed and he could no longer appeal. When N.A.A.C.P. Legal Defense Fund lawyers heard of his plight, they got nowhere at first. Local state and federal courts not only denied relief, but they also failed to furnish the record that University of Pennsylvania Law Professor Anthony Amsterdam needed in order to argue for a writ of habeas corpus before the Fifth Circuit's enlightened U.S. Court of Appeals in New Orleans (TIME, Dec. 4).

Then, around midnight, the night before Amsterdam was to appear in court, Chief Judge Elbert Tuttle sent over the court's own copy of the Harvey record. Amsterdam had hardly begun racing through it when he saw a golden chance to extend a landmark Supreme Court

The New York Times
TIMES SQUARE NEW YORK N Y 10036

FEB 3 1965

File Cox

February 1, 1965

Carl Rachlin, Esq.
Congress of Racial Equality
38 Park Row
New York 38, N. Y.

Dear Mr. Rachlin:

Thank you for your letter, which we appreciate.

We are only sorry that the pressure of space on our Letters column is such that we are not able to publish a larger proportion of letters received.

You may be sure, however, that your comments have been brought to the attention of The Times editorial board.

Very truly yours,

Louise P. Huger

Louise P. Huger
Letters Editor

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

March 1, 1965

MAR 2 REC'D

RE: COX v. LOUISIANA,
No. 49, OCT. TERM, 1964

Dear Sir:

The Court today denied the petition for rehearing in the above-entitled case.

Very truly yours,

JOHN F. DAVIS, Clerk
By
G. A. Sydnor
Assistant

Carl Rachlin, Esq.
165 W. 46th Street
New York, N. Y.

COPY

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

March 2, 1965

MAR 3 REC'D

Nils Douglas, Esquire
201 Douglas Life Ins. Bldg.
2211 Dryades Street
New Orleans 13, Louisiana

RE: Cox v. Louisiana, No. 49, Oct. Term, 1964

Dear Mr. Douglas:

The mandate of this Court in the above-entitled case has been mailed today to the Clerk of the Supreme Court of Louisiana.

Your client is given recovery for costs in this Court as follows:

Clerk's costs $100

This amount may be collected through the Supreme Court of Louisiana or direct from opposing counsel or parties.

Very truly yours,

JOHN F. DAVIS, Clerk

By Evelyn R Limstrong

(Mrs) Evelyn R. Limstrong
Assistant

cc: Carl Rachlin, Esq.
165 W. 46th Street
N. Y., N. Y. 10007

March 11, 1965

Nils R. Douglas, Esq.
Collins, Douglas & Elie
201 Douglass Life Insurance Building
2211 Dryades Street
New Orleans, Louisiana 70113

Re: Cox v. Louisiana

Dear Nils:

I have your letter of the 4th inst. Several of the questions you raise require consideration, and I will get someone on them.

By the way, have the bonds Cox was held on been discharged? What is Louisiana practice after a reversal of a conviction on this question? Also, after a reversal, is the defendant discharged under Louisiana procedure?

Can you give me advice on these questions since clearly they affect the questions you raise.

Let us hear from you. Regards to Bob and Lolis.

Cordially,

Carl Rachlin
General Counsel

CR:JG

COLLINS, DOUGLAS & ELIE
ATTORNEYS & COUNSELLORS AT LAW
201 DOUGLASS LIFE INSURANCE BUILDING
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA 70113

MAR 8 1965

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE

TELEPHONE
523-5197

March 4, 1965

Mr. Carl Rachlin
38 Park Row
New York, New York

Dear Carl:

I sent under separate cover the newspaper notice concerning the Cox case. The District Attorney intends to charge Cox again under an amended bill of information. This is obviously unconstitutional. I would appreciate any comments you have on the question. We have not yet been favored with a bill of information yet. Off the top of my head comes a few notions:

1. Motion for a speedy trial
2. Prescription
3. Removal
4. Double jeopardy
5. Denial of Due process and equal prolection.
6. Affirmative relief i.e. enjoin the prosecution by seeking first in the State Court and then the Federal Courts a T.R.O. and preliminary and final injunction.
7. It might be that the court does not have jurisdiction over Cox. How can he be properly served. The Clerk has already served notice on me and perhaps Murphy also. Are these effective to bring Cox in?

Maybe we could get some of the bright boys to do some research.

Pitcher is doing us a favor by kicking this dead mule. Maybe the New York papers will do something about this.

Respectfully,

COLLINS, DOUGLAS & ELIE

BY: Nils R. Douglas

NRD:br

MAR 8 1965

Mail to
Carl Rachlin

Baton Rouge

Rev. B. E. Cox Arraignment Set for May 7

3/3/65

Arraignment of Rev. B. Elton Cox of High Point, N.C., whose conviction in connection with a mass demonstration here in 1961 was recently reversed by the U.S. Supreme Court, Tuesday was assigned for May 7 on an amended charge stemming from the same incident.

Dist. Atty. Sargent Pitcher said he will amend the bill of information in the case to charge Cox with attempting to violate a state statute patterned after a federal law prohibiting demonstrations near courthouses if the demonstrations might intimidate the courts.

Cox, a field secretary for the Congress of Racial Equality, led some 2,000 Negro students from Southern University to the East Baton Rouge Parish courthouse to protest the arrest of integration pickets in December of 1961.

In overturning Cox's conviction on the charge, the high court ruled former Police Chief Wingate White had given Cox permission to demonstrate near the courthouse if he confined the demonstration to the sidewalk on the west side of St. Louis Street in front of the building.

The high court Monday refused to reconsider its decision reversing the conviction.

Dist. Judge Fred S. LeBlanc assigned the new arraignment date for Cox on a motion by the district attorney's office.

MURPHY W. BELL
ATTORNEY AT LAW
971 SOUTH 13TH STREET
BATON ROUGE, LA.

March 22, 1965

Nils R. Douglas, Esq.
2211 Dryades Street
New Orleans, Louisiana

Dear Nils:

I am sending your very excellent Brochure via of Greyhound Bus. In regard to the $310.50, I have no records to indicate what that expenditure was for although I am still searching. It would appear to me that it was either for a transcript or some duplications that we had ordered from the Clerk. Search your files for correspondence regarding the $310.50, and let me hear from you.

In regard to Cox I think extradition would be just what Pitcher wants. He is coming up for re-election at the end of this year and I think he wants to use Cox's prosecution to show the considerable segregationists in this area that he is still their fair-haired boy, without actually mouthing to much on the "racial question" in order not to alienate that bloc of our vote which he is presently wooing.

I should think that the best course to take is a counterattack against Pitcher and the Administration of Criminal Justice in the 19th Judicial District Court. You have a wealth of raw source data in your files.

I especially like your idea of removal on the grounds, inter alia, Pitcher is an unfair prosecutor, Judges are unfair, etc. It probably won't get very far under West, but it will give us a chance to legally "defame" him and the other "Court house crowd" when they show vindictiveness. In other words, what I am suggesting--let's be nasty and obnoxious.

Killer, show your "Killer instinct" when you have cornered your quarry!

Very truly yours,

M
W
B/syw

a national organization with affiliated local groups working

CONGRESS OF CORE RACIAL EQUALITY

to abolish racial discrimination by direct, nonviolent methods

38 PARK ROW
NEW YORK 38, NEW YORK
COrtlandt 7-6270

James Farmer
national director
Richard Haley
associate
Gordon Carey
assistant
Carl Rachlin, Esq.
general counsel

ADVISORY COMMITTEE
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James Peck
CORElator editor

STAFF
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program director
James McCain
director of organization
Marvin Rich
community relations director

April 5, 1965

APR 8 1965

Nils Douglas, Esq.
2211 Dryades St.
New Orleans, La.

Murphy Bell, Esq.
971 South 13th St.
Baton Rouge, La.

Dear Nils and Murphy,

Has a new information come down on Brother Cox yet? Removal to the Federal Court is one possibility. Another might be an action in the Federal Court to restrain the State Court from prosecuting Cox on the ground that it now constitutes persecution; it is done to help Pitcher's election; it is punitive against Cox because he has been so active in Civil Rights; there is no reasonable or rational basis for a new charge.

In other words, something a la Lois Chaffee. We could perhaps get a restraining order from the Fifth Circuit pending a trial if the Honorable West won't consider our need for relief.

What say you both?

Regards,

Carl Rachlin
General Counsel

CR:hdl the new information has not come down yet. The most important point I humbly suggest is not removal or an injunction but whether the La. courts have jurisdiction over Cox without having him within the jurisdiction. Please consider this point.

Nils

a national organization with affiliated local groups working

CONGRESS OF RACIAL EQUALITY

CORE

to abolish racial discrimination by direct, nonviolent methods

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CORElator editor

STAFF
Richard Haley
associate
Gordon Carey
assistant
Carl Rachlin, Esq.
general counsel
James McCain
director of organization
Marvin Rich
community relations director

mail to
Carl Rachlin

MAR 26 1965

March 22, 1965

Nils Douglas, Esq.
2211 Dryades St.
New Orleans, Louisiana

Dear Nils,

I probably do not understand Louisiana procedure, but when the case (Cox) was reversed by the Supreme Court, advise me whether this does not terminate the jurisdiction of the local Louisiana court over Cox.

If the answer to that question is yes, while they can file a new information, presumably they have no personal jurisdiction over him. Is this right or wrong?

Let me hear from you on this.

Best regards,

Carl

Carl Rachlin
General Counsel

cc: Murphy Bell, Esq.
Mr. Richard Haley

CR:hdl

(over)

The district attorney announced in the newspapers that he was going to charge Cox again. The next day I received a subpoena notifying me of the date of the arraignment of Cox. I noticed that the number of the case is the same as the old Cox charge. I have not received a copy of the new (?) amended (?) bill of information. Generally a reversal by the U.S. Supreme Court means ~~and~~ an end of the case. Apparently Pitcher feels that by the amended information device he can constitutionally charge Cox again. There are some new statutes L.S.A - R.S. 15:7.2 which as far as the state courts is concerned would permit this i.e. the formal filing of the charge. But in order to implement the charge they must secure Cox. Their theory apparently must be to get jurisdiction over Cox by serving his attorneys. Without having researched the problem I don't think the State can do this. Subject to a later change of opinion and subject to your approval along with Dot, Lolis & Nils Murphy I say let them extradite Cox.

S

3/30

March 22, 1965

Nils Douglas, Esq.
2211 Dryades St.
New Orleans, Louisiana

Dear Nils,

I probably do not understand Louisiana procedure, but when the case (Cox) was reversed by the Supreme Court, advise me whether this does not terminate the jurisdiction of the local Louisiana court over Cox.

If the answer to that question is yes, while they can file a new information, presumably they have no personal jurisdiction over him. Is this right or wrong?

Let me hear from you on this.

Best regards,

Carl Rachlin
General Counsel

cc: Murphy Bell, Esq.
Mr. Richard Haley

CR:hdl

COLLINS, DOUGLAS & ELIE
ATTORNEYS & COUNSELLORS AT LAW
201 DOUGLASS LIFE INSURANCE BUILDING
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA 70113

March 19, 1965

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE

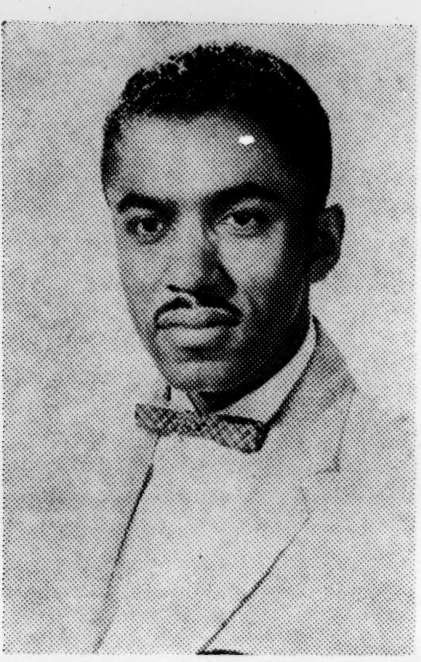
Murphy Bell, Esq.
971 South 13th Street
Baton Rouge, Louisiana

Dear Murphy:

I have spent a little time on the Cox case. At this point, subject to later change I am inclined to let them attempt to extradite Cox. This would put you and I on the spot for contempt probably. I don't think that they can get jurisdiction over Cox through us. This is a question we have to study. Please let me have your opinion.

I wrote you on March 11, 1965 asking about the $310.50 expenditure, for costs in the Cox case. Please let me hear from you.

NILS
Nils R. Douglas
NRD/vmg



as:

natter with District Attorney Sm-
n't people like that know that
an like me down? (smile) He
hat tax money spent trying to get
verty programs of "Lousy-anna".

hall I psepare for? I suppose
o apper just to answer NOT GULITY
an't an attorney do that? I
he cost. On or LONG before May 7
ope this matter can be stopped
ly to FEDERAL COURT. This is

hear from you. I am

cc: Rachlin
Haley
National Office

MURPHY W. BELL
ATTORNEY AT LAW
971 SOUTH 13TH STREET
BATON ROUGE, LA.

TELEPHONE
DI 8-3572

APR 8 1965

April 7, 1965

Carl Rachlin, Esq.
General Counsel
Congress of Racial Equality
38 Park Row
New 38, New York

Re: B. Elton Cox

Dear Carl

Enclosed are two letters that Nils and I exchanged on Cox. As you can see we (Nils and I) seem to have different approaches to this matteroof Cox prosecution.

As you can further see I favor your approach--removal, etc.

I have already initiated this method in the case of State v. Dr. Tyson (see enclosed speciman of removal petition). The cases are somewhat similar. I feel that Cox's case is much stronger, and is the ideal vehicle to expand and liberalize the removal jurisprudence in this area. Of course, as you probably know, the biggest obstacle to removal is the very restrictive procedures required by the Rives v. Virginia and Kentucky v. Powers line of cases.

Of course, you fellows make the decisions and I am willing to follow whatever course that is deemed wisest in your considered judgment.

I have not been "noticed" to appear for the arraignment, and I will not do so, unless given specific instructions from either the New York or New Orleans office.

By the way, check on that "balance" that we talked about in New York.

Best well.

Very Truly yours

Murphy W. Bell

MWB/ps
enclosure
cc Nils R. Douglas

P.S. Why not send Nils a xerox copy of the Tyson removel petition. I am short.

TELEPHONE
DI 8-3572

MURPHY W. BELL
ATTORNEY AT LAW
971 SOUTH 13TH STREET
BATON ROUGE, LA.

March 22, 1965

Nils R. Douglas, Esq.
2211 Dryades Street
New Orleans, Louisiana

Dear Nils:

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I especially like your idea of removal on the grounds, inter alia, Pitcher is an unfair prosecutor, Judges are unfair, etc. It probably won't get very far under West, but it will give us a chance to legally "defame" him and the other "Court house crowd" when they show vindictiveness. In other words, what I am suggesting--let's be nasty and obnoxious.

Killer, show your "Killer instinct" when you have cornered your quarry!

Very truly yours,

Murphy

M
W
B/syw

From the desk of

☐ ROBERT F. COLLINS
☒ NILS R. DOUGLAS
☐ LOLIS E. ELIE

Dear Murphy

I feel that between Pitcher getting a little publicity and our having to defend Cox or the other I would be willing to have Pitcher get his publicity. He needs a good press. We have backed his ass consistently. The question which you haven't answered is can the court get jurisdiction over Cox through us.

Nils do you intend to appear on the date of the arraignment??

Can a man be extradited on a misdemeanor? Would you check with Perry Johnson's office to find out what the check (Cox) was for.

COLLINS, DOUGLAS & ELIE
ATTORNEYS & COUNSELLORS AT LAW
201 DOUGLASS LIFE INSURANCE BUILDING
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA 70113
523-5197

U. S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED
MAR 30 1965
A. DALLAM O'BRIEN, JR.
CLERK

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
BATON ROUGE DIVISION

DR. BERTRAND A. O. TYSON *

Petitioner, * CRIMINAL SECTION

v. * NUMBER: 1585

STATE OF LOUISIANA *

Respondent, * FILED:

* *

PETITION FOR REMOVAL OF CRIMINAL ACTION
FROM 19TH JUDICIAL DISTRICT COURT, STATE OF LOUISIANA
TO THE UNITED STATES DISTRICT COURT, EASTERN
DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

I.

1. Petitioner is Dr. Bertrand A. O. Tyson, a physician, a Negro citizen of Iberville Parish, State of Louisiana and of the United States. He holds memberships in the National Association for the Advancement of Colored People, Congress of Racial Equality, and The Afro-American Worker's Defense League, associations of persons engaged in seeking, by lawful and peaceful means, the equal civil rights of Negroes and all persons in the State of Louisiana and in the United States.

2. On or about November 20, 1964, petitioner went to the Lakeshore Parliament House, a hotel located in Baton Rouge near the State Capitol Building. Petitioner then proceeded through the lobby to inquire of, and rent an automobile, from Avis-Rent-a-Car Company, which maintains offices at said Hotel.

3. Petitioner contracted to lease for an indefinite period, a 1964 Chevrolet Impala, Louisiana license number 381196 and a printed lease form to that effect was duly signed, dated and executed by the parties. Petitioner paid a $50.00 deposit as consideration for the lease agreement and was given the immediate possession of the car.

4. On or about January 15, 1965, the manager telephoned the Petitioner, who lives in the Plaquemine, Louisiana, and demanded immediate possession of the leased property. There was some heated discussion, with racial overtones, whereupon petitioner broke off the conversation and hung up the phone.

5. Petitioner was arrested the next day on a warrant from the East Baton Rouge District Attorney's office and subsequently released after posting bail. A criminal bill of Information was later filed against petitioner charging him with violating "on or about January 15, 1965" Louisiana Revised Statute 14:68 (unauthorized use of a movable). Petitioner applied for a Bill of Particulars and moved to quash the Information. Argument was had and memoranda of law were filed. The State District Court ruled that petitioner must stand trial. Petitioner now seeks to remove.

II.

6. The acts for which petitioner is being held to answer for the offense as charged, are, insofar as the offense charged have any basis in fact, acts in the constitutionally protected excercise of petitioner's right of freedom of speech, assembly, and petition guaranteed by U.S. Constitutional Amendments I, XIV and 42 U.S.C. Sec. 1983 (1958), which acts are also in the excercise of petitioner's privileges and immunities as a citizen of the United States guaranteed by U.S. Constitutional Amendments. XIV, XV, and 42 U.S.C. sec 1985 (1958), and 42 U.S.C., Sec. 1971 (1958) to disseminate information concerning the means of registration for voting in federal elections, and information concerning the federal rights of Negroes to vote in all elections without abridgement by reasons of race, and to urge Negroes

having the qualifications of voters to register for voting in all such elections. Petitioner further contends that the Civil Right Act of 1964 protected his right to enter into the Lakeshore Parliament House Hotel to contract therein and enjoy the full and equal services of its facilities, privileges, advantages and accomodations without discrimination, intimidation, threats, coercion, or attempts to punish. Insofar as the crime charged against petitioner is based on allegations of conduct not protected by the federal Constitution and laws cited, those allegations are groundless in fact. Conviction of petitioner on the charge against him, has, and will punish him for the exercise of rights, privileges and immunities secured him by the federal Constitution and laws, and has, and will deter him and others similarly situated from the future exercise of these rights, privileges and immunities, for if Louisiana Statute 14:68 under which he is prosecuted makes petitioner's conduct criminal, then R.S. 14:68 is unconstitutional as applied, whereas if the statutes are construed so as to save their constitutionality under the federal Constitution, there is no evidence upon which petitioner may be convicted, consistent with the due process of law required by the Fourteenth Amendment.

7. The arrest and prosecution of petitioner, Dr. Bertrand A. O. Tyson, has been and is being carried on with the sole purpose and effect of harassing petitioner and of punishing him for, and deterring him from exercising his constitutionally protected rights of free speech and assembly to protest the conditions of racial discrimination which the State of Louisiana now maintains by statute, ordinance, regulation, custom, usage, force and practice, and to urge Negroes, the victim of this discrimination, to register for voting in federal and state elections, free of racial

discrimination. The harassment of petitioner is pursuant to a policy of racial discrimination which is now encouraged, followed and enforced by legislation, and by action of the executive and Judicial branches, of the State of Louisiana.

III.

8. By reason of the foregoing, petitioner is being prosecuted for acts done under color of authority derived from the federal Constitution and laws providing for equal rights, that is, United States Const. Amends. I, XIV, XV; 42 U.S.C., sec. 1971, 1983, 1985 (1958), and The Civil Rights Act of 1964 and for refusing to do acts on the ground that they would be inconsistent with the Constitution and laws cited. Also by reason of the allegations of paragraphs 1 to 7 above and more particularly of paragraph 9 below. Petitioner has been denied, is being denied, and cannot enforce in the Courts of the State of Louisiana rights under the cited federal Constitutional and statutory sections providing for the equal rights of citizens of the United States and of all persons within the jurisdiction of the United States.

IV.

9. Petitioner is unable to enforce his federal rights in the state courts of Louisiana and particularly in the 19th Judicial District Court, because those courts are hostile to petitioner by reason of race and his civil rights' activity and by reason of the commitment of those courts to enforce Louisiana's policy of racial discrimination. In the District Court for East Baton Rouge Parish where petitioner will be tried:

   (a) District Court Judges are elected for terms of four years at elections at which Negroes have been systematically denied the right to vote by reason of race in violation of the Fifteenth Amendment.

   (b) Negroes are systematically excluded from the juries by reason of race.

(c) Criminal defendants charged with offenses arising out of demonstrations and other exercise of their equal civil rights have usually been held to answer under excessive and exorbitant bail and if convicted maximum imposition of sentence is imposed.

(d) Negro defendants, Negro witnesses and Negro attorneys are addressed by their first names, as a mark of contempt and racial discrimination in violation of the Equal Protection Clause.

(e) The Court sits in a community which is hostile to and inflamed against Negroes and, in particular, hostile to and inflamed against persons like petitioner who actively exercise his federal Constitutional rights by working in a lawful and peaceful manner to achieve the equal rights of Negroes and of all persons within the State of Louisiana and the United States.

V.

10. Petitioner attaches hereto and makes a part hereof, the same as if written in extenso, the following documents filed in the State proceedings:

1. Certified copy of Bill of Information
2. Certified copy of Application for Particulars
3. Certified copy of Motion to Quash
4. Answer to Application for Particulars (certified)
5. Memoranda in support of Motion to Quash (certified)
6. Memoranda opposing Motion to Quash (certified)
7. Certified copy of Extract of minutes in State v. Tyson #52,627 Criminal

WHEREFORE, petitioner prays that this criminal proceeding be removed from the 19th Judicial District Court for East Baton Rouge, Louisiana, for trial pursuant to 28 U.S.C. sec. 1446 (1958) since the proceedings removed are criminal, no bonds or filing fees are required with this petition.

(b) That the Court grant petitioner such other relief from time to time as to it may appear just and reasonable for the protection of petitioner's rights herein.

By Attorney:

MURPHY W. BELL
971 SOUTH 13TH STREET
BATON ROUGE, LOUISIANA

V E R I F I C A T I O N

I, Murphy W. Bell, of lawful age, first being duly sworn upon oath, depose and say:

That I am a member of the bar of Louisiana and of the U. S. District Court for the Eastern District of Louisiana.

That I am the duly authorized attorney for petitioner herein, authorized to prepare and verify the annexed petition:

That I have read the annexed petition and know the contents thereof;

That I know of my personal knowledge that all facts stated therein are true except such as are stated on information and belief;

That as to subject matter I believe the petition to be true; and

That I sign this verification on behalf of the petitioner, because the annexed petition deals chiefly with matters of law and legal inference to be drawn from facts alleged and/or of which I as an attorney have more knowledge than the petitioner.

MURPHY W. BELL

Sworn to and subscribed to before me
this 30th day of March, 1965.

NOTARY PUBLIC

From the desk of

- ☐ ROBERT F. COLLINS
- ☒ NILS R. DOUGLAS
- ☐ LOLIS E. ELIE

Carl

MAY 17 1968

Mr. Carl Rachlin Esq.
C.O.R.E.
38 Park Row
New York 38, New York.

Dear Carl

I would appreciate it greatly if some kind of application could be made directly to the U.S. Supreme Court in the Cox Case. I am 100% in agreement.

Respectfully

Nils

COLLINS, DOUGLAS & ELIE
ATTORNEYS & COUNSELLORS AT LAW
201 DOUGLASS LIFE INSURANCE BUILDING
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA 70113
523-5197

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

May 13, 1965

MAY 17 1965

Carl Rachlin, Esquire
General Counsel
CORE
38 Park Row
New York 38, New York

RE: COX v. LOUISIANA
Nos. 24 & 49, Oct. Term, 1964

Dear Mr. Rachlin:

The above-entitled cases having been disposed of by this Court, I am returning to you herewith the original exhibits filed therein.

Kindly acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

JOHN F. DAVIS, Clerk

By W. V. Gullickson

W. V. Gullickson
Assistant

WVG:mk
Enclosures

LAW OFFICES

TEmple 3-2809

SAMUEL S. MITCHELL

126½ East Hargett Street
Raleigh, N. C. 27601

1962
JUN 15 RECD

Mr. Carl Rachlin
280 Broadway
New York, New York

Dear Mr. Rachlin:

Last week, as you may be kind enough to remember, I did some work for you through Miss Rogers--I also talked briefly with you during the Columbia conference on civil rights law. I would like to impose on that brief acquaintance to ask a favor.

We are handling the Union County kidnapping case--North Carolina v Mallory et al--on appeal. Among the arguments we are making is that defendants were deprived of due process of law by the consistent address of white persons as "Mister" or Mrs. etc. and of Negro defendants by their names alone. As you know such questions are novel under the due process (as opposed to the equal protection) clause. We would appreciate a copy of your brief on this question in the related case of Cox v Louisiana. While of course our case is quite distinct in many of its implications it nevertheless is analogous and we could benefit from your thoughts on the conceptual problems involved.

Thank you very much for any help you can give us in this matter. (We are incidentally also writing to your associated counsel Collins, Douglas, and Elie in New Orleans in case they and not you have copies of the brief.

Yours truly,

Don B. Kates Jr.

COLLINS, DOUGLAS & ELIE
ATTORNEYS & COUNSELLORS AT LAW
201 DOUGLASS LIFE INSURANCE BUILDING
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA 70113

JUN 25 1965

June 23, 1965

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE

TELEPHONE
523-5197

Carl Rachlin, Esq.
38 Park Row
New York, New York

Dear Carl:

We are drawing up a petition to be filed in the U.S. Supreme Court seeking to hold Pitcher in contempt. We will send it to you as soon as the draft is completed.

Respectfully,

COLLINS, DOUGLAS & ELIE

BY: _____

NRD/ew

COLLINS, DOUGLAS & ELIE
ATTORNEYS & COUNSELLORS AT LAW
201 DOUGLASS LIFE INSURANCE BUILDING
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA 70113

ROBERT F. COLLINS
NILS R. DOUGLAS
LOLIS E. ELIE

TELEPHONE
523-5197

July 14, 1965

COPY

Marvin Rich, Esq.
S.E.D.F.
150 Nassau Street
Room 1312
New York, New York

Dear Marvin:

Enclosed please find letter from 5th Circuit requiring us to deposit $300.00 in the Cox case (we were successful in preventing Sargent Pitcher from prosecuting Cox) We can reduce costs by having the record mimeographed at the rate of 1.40 per page amounts to $154.00 plus $25.00 docketing fee $179.00. We have until July 23rd to deposit this money. We are not in a position to advance these costs so please send us two checks for $25.00 and $154.00. Make the large check payable to the A. B letter Service.

Respectfully,

COLLINS, DOUGLAS & ELIE

BY:_____

NRD/vrg

ENCL: 1

cc; Carl Rachlin, Esq.
38 Park Row
New York, New York

August 12, 1965

Paul Ivan Birzon, Esq.
Mintz & Birzon
605 Brisbane Building
Buffalo, New York 14203

Dear Mr. Birzon:

Attached you will find our brief for Cox v. Louisiana. We are sending you under separate cover a copy of our brief for People v. Penn.

While we are happy to be able to assist you, the copy of the Cox brief is the only one we have. It is therefore imperative that you return it to us when you are finished with it.

Very truly yours,

Carl Rachlin
General Counsel

CR:mk

MINTZ & BIRZON
ATTORNEYS AND COUNSELLORS AT LAW

JOSEPH D. MINTZ
PAUL IVAN BIRZON

AREA CODE 716

605 BRISBANE BUILDING
BUFFALO, NEW YORK 14203

856-8800

August 11, 1965

AUG 12 1965

Carl Rachlin, Esq.
38 Park Row
New York 38, New York

Dear Mr. Rachlin:

You may recall that our last telephone conversation related to a case in which I was acting as counsel for twenty-eight defendants accused of violating sections 2036 and 722-2 of the Penal Law as a result of a sit-in at the offices of the Board of Education in the City of Buffalo, New York. Following our conversation you were kind enough to provide me with copies of memoranda involving propositions of law relevant to the issues in my case. You also indicated that I might feel free to request further information if the same became necessary.

In our case the charges involving a violation of section 2036 were dismissed against all defendants and following a four day trial in the City Court of Buffalo, sixteen of the defendants were acquitted and twelve convicted on the charge of violation of section 722 of the Penal Law. An appeal has been taken to the Erie County Court from the judgment of conviction in behalf of all twelve defendants.

I wonder whether you would be kind enough to forward copies of your Briefs in Cox v. Louisiana and People v. Penn as well as any other memoranda or briefs you may have which involve issues similar to those which are to be raised in our case. The issues which will emerge from our case will undoubtedly resemble those which were produced by the appeal in People v. Martin, 15 N. Y. 2d 933. Though facts in our case are similar to those in the Martin case, I introduced

testimony by some of the defendants that they had no intention of remaining at the offices of the Board of Education beyond the hour scheduled for closing. I hope this will sufficiently remove our case from what appeared to be the area of major concern by the Court of Appeals in Martin.

Thank you ever so much for your courtesy and cooperation. I shall anticipate hearing from you at your convenience.

Yours very truly,

MINTZ & BIRZON

BY: PAUL IVAN BIRZON

PIB:ak

MSS 546 SEDFRE CURTIS, ROBERT B. et al vs TOZER, MARTIN L. et al (JEFFERSON BANK AND TRUST CO., MISSOURI) 1964

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Ex parte	)	
	)	No. _____
ROBERT B. CURTIS, WILLIAM L. CLAY,	)	
LUCIEN RICHARDS, REV. CHARLES PERKINS	)	HABEAS CORPUS
and NORMAN R. SEAY	)	

To the Honorable Roy W. Harper, James H. Meredith or John K. Regan
Judges

APPLICATION FOR A WRIT OF HABEAS CORPUS

Your Petitioners, Robert B. Curtis, William L. Clay, Lucien Richards, Rev. Charles Perkins, and Norman R. Seay state:

I.

That they are unlawfully restrained of their liberty and imprisoned by WILLIAM BOEGER, Warden of the City Jail of the City of St. Louis at St. Louis, Missouri, in violation of the Constitution of the United States.

II.

That said unlawful restraint is pursuant to certain Findings of Fact and Judgments and Orders of Commitment rendered on the 25th day of October, 1963, in a contempt proceeding before the Honorable Michael J. Scott, Judge, Division No. 2, St. Louis Circuit Court, in Cause No. 57945 E.

III.

The jurisdiction of this Court is invoked pursuant to Title 28, Section 2241, et seq., United States Code. All adequate state remedies available to Petitioners have been exhausted by them. The legality of the imprisonment of the Petitioners was presented to and adjudged by the St. Louis Court of Appeals in a Habeas Corpus Proceeding, (See Exhibit 12); however, an Application for a Writ of Habeas Corpus to the Supreme Court of Missouri was denied (See Exhibit 13); further Petitioners state that no Application for a Writ of Habeas Corpus has been made to any Federal Courts of the United States.

IV.

The facts concerning the Petitioners' commitment and restraint

are as follows:

1. The Petitioners have been sentenced to definite terms ranging from 60 days to nine (9) months in the City Jail in the City of St. Louis, Missouri, and fined Five Hundred Dollars ($500.00) to One Thousand Dollars ($1,000.00) each and ordered to pay one-ninth (1/9) of the court costs. (See Findings of Fact and Judgments and Orders of Commitment Exhibits P-1, A-G, and P-2, A-G)

2. The background of the convictions stem from a suit for injunction filed by the Jefferson Bank and Trust Company in the St. Louis Circuit Court on the 29th day of August, 1963. (See Exhibit P-3). That case is styled according to the Petition for Injunction as follows:

(a) "Jefferson Bank andTrust Company, a corporation, Plaintiff vs Robert B. Curtis, William L. Clay, Charles R. Oldham, Marion Oldham, Lucien Richards, Clyde S. Cahill, Jr., Richard Daly, Walter Hayes, Rev. Charles Perkins, Norman Seay, Herman Thompson, and Melvin West, individually and as representatives of a class known as St. Louis Committee of Racial Equality, defendants," being Cause No. 57945 E.

(b) The summons as prepared and served in said Cuase was as follows:

"The State of Missouri to defendants Robert B. Curtis, William Clay, Charles R. Oldham, and Marian Oldham, Lucien Richards, Clyde S. Cahill, Jr., Richard Daly, Walter Hayes, Rev. Charles Perkins, Norman Seay, Herman Thompson, Melvin West, Individually and as representatives of a class known as St. Louis Committee of Racial Equality."

(c) The Return of Service on the Summons as made by MARTIN L. TOZER, Sheriff, dated August 30, 1963, is as follows:

"I hereby certify that I have served the within summons (1) by delivering on the 30th day of August, 1963, a copy of the Summons and a copy of the Petition to each of the within named defendants Robert B. Curtis, William L. Clay, Marian Oldham, Lucien Richards, Rev. Charles Perkins, Norman Seay, Herman Thompson, individually and as representatives of a class known as St. Louis Committee of Racial Equality. After due and diligent search in the City of St. Louis, Missouri, the following defendants could not be found in the City of St. Louis, Missouri, Melvin West, Richard Daly, and Walter Hays."

(d) In paragraphs two (2) and three (3) of the body of the petition for injunction filed by plaintiff bank reference is made again to the defendants individually and as representatives

of the St. Louis Committee of Racial Equality.

(e) In paragraphs one (1) and two (2) of the prayer in plaintiff bank's petition for an injunction are found the following:

"(1) That this court issue its restraining order, restraining and enjoining the defendants and each of them and all persons acting by, through, or under them, and every other person or persons acting under the direction or instruction or in concert with them from: . . . "

"(2) That with or without issuing its restraining order as prayed above, and with or without an order to show cause, this court issue its temporary injunction restraining and enjoining the defendants and all other persons mentioned above in said paragraph one (1) of this prayer." (See Exhibit P-3)

(f) At 1:55 p.m., Friday, August 30, 1963, the Court issued a ~~temporary restraining order~~, the first paragraph of which is as follows:

"In the Circuit Court of the City of St. Louis, State of Missouri, Jefferson Bank and Trust Company, a corporation plaintiff vs Robert B. Curtis, et al. #57945 E, Division No. 2 Temporary restraining order to issue to all defendants individually and as representatives of a class known as St. Louis Committee of Racial Equality from: . . . " (See Exhibit P-4)

(g) The indemnity bond filed by the bank was not responsive to the restraining order issued by the court in that it indemnified only the named individuals and did not indemnify the members of the class. (See Exhibit P-5)

3. The Saint Louis Committee of Racial Equality commonly referred to as CORE, is a branch of the national organization known as the Congress of Racial Equality. St. Louis CORE has sought to alleviate racial discrimination in public accommodations, housing, government, business and particularly in the area of employment where it has sought to improve working conditions and equal employment opportunities for Negroes by establishing standards of equal employment and equal promotional practices.

(a) The plaintiff, Jefferson Bank and Trust Company, is a federally insured bank engaged in substantial interstate commerce.

(b) For a period of three or four years, St. Louis CORE had

negotiated with Jefferson Bank in an attempt to secure jobs for Negroes and opportunities for equal advancement and promotion for Negroes. About August 14, 1963, St. Louis CORE wrote a letter to the Jefferson Bank and Trust Company asking the bank to employ four (4) Negroes in clerical capacities. The Jefferson Bank replied with a written communication denying the request. (See Exhibits P-6 and P-7). Later, St. Louis CORE sent a committee to the bank for a conference urging the bank to act favorably upon the request for the employment of Negroes. The bank refused to hire four Negroes or consider alternate plans for the hiring of Negroes presented by the CORE committee.

4. After the final negotiations with the bank St. Louis CORE held a strategy meeting on August 29, 1963 and voted to take direct action against the bank. On the afternoon of August 30, 1963 petitioners and other demonstrators appeared at the bank and engaged in peaceful picketing until about 5:10 p.m. at which time a number of demonstrators stood in front of the bank doors and later large numbers of the demonstrators entered the bank, sang freedom songs, and sat on the floor of the bank. None of the petitioners herein stood in front of the bank doors and only one of these petitioners demonstrated inside the bank. The demonstration ended at 6:00 p.m. and everyone left the bank. No arrests were made and no requests for the arrest of any persons was made by any bank representative.

5. On Saturday evening, August 31, 1963, a special session of court was called and the bank attorney filed an application for citation asking for attorney fees, and costs and expenses on behalf of the plaintiff bank. (See Exhibit P-8) The court in an ex parte proceeding issued body attachments for Petitioners directing the Sheriff to produce the Petitioners before the court on Tuesday, September 3, 1963. (See Exhibit P-9). The Sheriff subsequently attached the Petitioners and held them at the City Jail unless bail was furnished in the sum of $10,000. One Petitioner furnished bail

and the remaining four were held in the custody of the Sheriff until released by the St. Louis Court of Appeals.

6. On Tuesday, September 3, 1963, Petitioners were brought before Division 2 of the Circuit Court of the City of St. Louis, their attorneys and Petitioners were served for the first time with copies of the attachment and the application for contempt citation. Petitioners' motion for a continuance was denied and they were granted 30 minutes to confer with their attorneys. Leave for time to file an Application for Writ of Prohibition in the St. Louis Court of Appeals was requested and the court allowed 24 hours for the filing of this Writ. On Tuesday afternoon an Application for Writ of Habeas Corpus was filed in the St. Louis Court of Appeals on behalf of four of the Petitioners who had not made bail and who were still in jail, and said Petitioners were released by the Court of Appeals at a night session. On Wednesday, September 4, 1963, Petitioners' Application for Writ of Prohibition was denied and the trial court then continued the Proceedings at the suggestion of the Court of Appeals. Depositions on behalf of Petitioners and plaintiff bank were taken and Petitioners appeared and gave testimony on September 7, 1963. On September 18, 1963, eleven days after Petitioners were deposed under the Rules of Civil Procedure the attorney for the bank was appointed as Special Prosecutor and on September 18, 1963, Petitioners were served for the first time with a notice setting forth the facts constituting the contempt charged. (See Exhibit 10). On September 23, 1963, trial was commenced and during the trial it appeared that the attorney for the bank, who is the son-in-law of the president of said bank, had interviewed a 16-year-old member of the defendant class and promised her and her brother immunity if she would "cooperate" and testify on behalf of the bank. Plaintiff's attorney, now the special prosecutor, told the class defendant that she could be placed in prison and he could extradite her brother from Wisconsin "if I please".

(See Exhibit 11).

7. Petitioners were found guilty and "punished as for criminal contempt and committed on the 25th day of October, 1963, to the City Jail of St. Louis, Missouri, on fines ranging from Five Hundred Dollars ($500.00) to One Thousand Dollars ($1,000.00), and imprisonment ranging from 90 days to nine months in the City Jail where they have since remained in custody of the Warden of said jail, except for the period of time they were admitted to bail pending a Habeas Corpus Proceeding in the St. Louis Court of Appeals.

8. All exhibits named herein are attached to this Application and made a part hereof.

V.

That by reason of the foregoing facts, Petitioners' restraint is illegal and contrary to the provisions of the Constitution of the United States of America in that Petitioners have been denied due process of law and the equal protection of the law contrary to the Fourteenth Amendment of the United States Constitution

(1) By reason of the court so applying R.S. Mo. 1959, Section 56.110 and the public policy of Missouri so as to permit conviction and punishment as for criminal contempt when prosecuted by an interested person and a private party litigant.

(2) By reason of the court's failure to remove the bank's attorney as special prosecutor after evidence of misconduct.

(3) By reason of the Supreme Court of Missouri having failed and refused to resolve the conflict in opinions between the Springfield Court of Appeals and the St. Louis Court of Appeals on the interpretation of Supreme Court Rule 92.09, R.S. Mo. 1959, Section 526.070 as to the requirements of the indemnity bond;

(4) By reason of abridging the obligation of contract by its interpretation of R.S. Mo. 1959, Section 526.707 which set the requirements of an indemnity bond for jurisdiction of the trial

court in the injunction proceeding;

(5) By reason of the Court so applying R.S. Mo. 1959, Section 476.110-476.140 and Supreme Court Rules 35.01 and 92.15 in such a way that these Petitioners were tried for civil contempt but found guilty of criminal contempt;

(6) By reason of Petitioners having been effectively denied a review by appeal in the appellate courts and Petitioners having to remain in jail while seeking a review of their convictions and detention in a Habeas Corpus Proceeding;

(7) By reason of using a temporary restraining order to enforce against Petitioners, the racial discriminatory hiring policy of a federally insured bank engaged in substantial interstate commerce where the terms and conditions of employment were involved;

(8) By reason of excessive fines and sentences, all of which constitute a denial of the equal protection of the law, a deprivation of Petitioners' liberty without due process of law, an abridgement of the right to contract, a denial of freedom of speech, and cruel and unusual punishment in violation of the First, Sixth, Tenth, and Fourteenth Amendments of the Constitution of the United States, and Article 1, Sections 10, 18a, 20, and 21 of the State of Missouri.

(9) By reason of the court ignoring the jurisdictional requirements throughout these proceedings.

WHEREFORE, Petitioners pray that the Court grant the within Application and that a Writ of Habeas Corpus be ordered to issue to William Boeger, Warden of the City Jail of the City of St. Louis and requiring him to produce the Petitioners forthwith before this Court as is by statute provided; that Petitioners be discharged from

their unlawful imprisonment; or that Petitioners be admitted to bail forthwith pending a hearing of this Proceeding on its merits and the discharge of these Petitioners.

Robert B. Curtis

William L. Clay

Lucien Richards

Rev. Charles Perkins

Norman R. Seay

Petitioners

Attorneys for Petitioners:

Clyde S. Cahill

Joseph S. McDuffie

Robert E. Wilson, Jr.
4332a Easton
OL 2-3284

Of Counsel:

Robert L. Witherspoon

Charles R. Oldham

Emanuel Williams

Wyvetter H. Younge

Margaret B. Wilson

Robert Ratermann

All of the City of St. Louis

STATE OF MISSOURI)
) SS.
CITY OF ST. LOUIS)

The Affiants, Robert B. Curtis, William L. Clay, Lucien Richards, Rev. Charles Perkins, and Norman Seay, Petitioners in the above and foregoing Application for Writ of Habeas Corpus make oath and say that the facts and allegations stated in the above and foregoing Application are true according to their best knowledge information and belief.

_____
Robert B. Curtis

_____
William L. Clay

_____
Lucien Richards

_____
Rev. Charles Perkins

_____
Norman Seay

Subscribed and sworn to before me this _____ day of _____, 19____.

_____
Notary Public within and for the City of St. Louis, State of Missouri.

My Commission expires _____.

INDEX OF EXHIBITS -- FIRST FIVE

P -	1a	Findings of Fact and Judgment	Robert B. Curtis
	b		William L. Clay
	c		Lucien Richards
	d		Rev. Charles Perkins
	e		Norman Seay
P -	2a	Commitment Order	Robert B. Curtis
	b		William L. Clay
	c		Lucien Richards
	d		Rev. Charles Perkins
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P -	3	Petition for Injunction	
P -	4	Temporary Restraining Order	
P -	5	Injunction Bond	
P -	6	Letter of August 14, 1963, Robert Curtis to Jefferson Bank and Trust Co.	
P -	7	Letter of August 27, 1963, Wayne Millsap to Robert Curtis	
P -	8	Application for Citation	
P -	9	Body Attachment	
P -	10	Notice of September 18, 1963, Containing Charges and Specifications	
P -	11	Portion of Transcript Designated "Appendix B"	
P -	12	Answer to Return of Writ of Habeas Corpus filed in the St. Louis Court of Appeals and Opinion of said Court	
P -	13	Application for Writ of Habeas Corpus filed in the Supreme Court of Missouri and the Court's Order Denying Said Application.	

I N T H E S T. L O U I S C O U R T O F A P P E A L S

J A N U A R Y S E S S I O N, 1 9 6 4

In the Matter of:	)	
	)	
ROBERT B. CURTIS, WILLIAM L. CLAY,	)	
CHARLES R. OLDHAM,	)	
MARIAN OLDHAM, LUCIEN RICHARDS,	)	No. 31,777
REV. CHARLES PERKINS, NORMAN SEAY,	)	
HERMAN THOMPSON, and RAYMOND HOWARD,	)	HABEAS CORPUS
	)	
Petitioners,	)	
	)	
vs.	)	
	)	
MARTIN L. TOZER, Sheriff of the	)	OPINION FILED
City of St. Louis, and	)	
WILLIAM BOEGER, Warden of the	)	January 15, 1964
Municipal Jail, City of St. Louis,	)	
	)	
Respondents.	)	

In the Matter of:	)	
	)	
LOUIS FORD, IAN GRAND,	)	
BENJAMIN GOINS, ROBERTA TOURNOUR,	)	No. 31,778
TAYLOR JONES, KENNETH LEE and	)	
RONALD GLENN,	)	HABEAS CORPUS
	)	
Petitioners,	)	
	)	
vs.	)	
	)	
MARTIN L. TOZER, Sheriff of the	)	OPINION FILED
City of St. Louis, and	)	
WILLIAM BOEGER, Warden of the	)	January 15, 1964
Municipal Jail, City of St. Louis,	)	
	)	
Respondents.	)	

In the Matter of:	)	
	)	No. 31,779
MICHELA GRAND, DANIEL POLLACK, and JAMES PEAKE, JR.,	)	HABEAS CORPUS
Petitioners,	)	
vs.	)	
MARTIN L. TOZER, Sheriff of the City of St. Louis, and WILLIAM BOEGER, Warden of the Municipal Jail, City of St. Louis,	)	OPINION FILED
	)	January 15, 1964
Respondents.	)	

Original proceedings in habeas corpus. Petitioners seek their release from detention by the respondent Sheriff and the respondent Warden who hold the petitioners in compliance with certain orders of the circuit court following an adjudication by that court that petitioners were guilty of criminal contempt. The sentences and fines imposed vary among the 19 petitioners and will be fully set out later herein.

The circuit court had issued an injunction pertaining to certain activities at or near the Jefferson Bank and Trust Company in the City of St. Louis, and the contempt citations arose out of alleged violations of that injunction. These alleged violations occurred upon different dates and involved different petitioners on each date. Thus, our No. 31,777 encompasses the 9 petitioners who are alleged to have first violated the injunction; No. 31,778 refers to the 7 petitioners who are alleged to have next committed contemptuous acts; and No. 31,779 encompasses the petitions for habeas corpus filed by the 3 alleged contemnors whose acts, in point of time, last occurred.

It seems wise to place those facts applicable to all 3 consolidated files in some sort of chronological perspective. The petitioner Curtis wrote a letter dated August 14, 1963 to the Jefferson Bank and Trust Company which he signed "Chairman of CORE." The first paragraph of that letter reads as follows: "As a result of our conversation last week and the report given by Rev. Charles Perkins and me, the Saint Louis Committee of Racial Equality voted to take direct action against Jefferson Bank if four full time Negroes are not hired in clerical or teller positions within two weeks." Under date of August 27th, the bank replied in a letter signed by its attorney in which it stated reasons for rejecting the proposal that it hire 4 Negro employees within the time stated in Curtis' letter. Briefly put, these were that it did not need 4 additional employees to do the work it had; that it did not have applications from 4 qualified Negroes seeking such employment; that it was unwilling to discharge other employees to make room for these 4 Negro employees; that to do so would in itself be discrimination, rendering the demands in violation of the Fair Employment Practices Act of the City of St. Louis. The course of events is illustrated by a paragraph in that letter stating: "The bank has now been informed, through the local press, that your organization intends to take 'direct action' against the Jefferson Bank from 4:00 to 6:00 p.m. on Friday, August 30th. This 'direct action' has been described by you to include sit-ins, stand-ins and lie-ins which may interfere with the conduct of the business of the bank during critical hours of its operation." The letter concluded by urging CORE not to hold such demonstrations.

Seeking to avoid what it considered to be the harmful effect of such demonstrations, the bank made a verified application on August 29th

to the circuit court for a temporary restraining order. The style of the proceedings in which all of the orders herein referred to were entered is of some importance. It reads:

> "JEFFERSON BANK AND TRUST COMPANY,
> a corporation,
>
> "-vs- 57945-E
>
> "ROBERT B. CURTIS, WILLIAM L. CLAY, CHARLES R. OLDHAM and MARIAN OLDHAM, LUCIEN RICHARDS, RICHARD DALY, WALTER HAYS, REV. CHARLES PERKINS, NORMAN SEAY, HERMAN THOMPSON, MELVIN WEST, Individually and as representatives of a class known as St. Louis Committee of Racial Equality."

The temporary restraining order was issued and the defendants ordered to show cause on September 26th why a temporary injunction should not be granted. The Sheriff's return shows that on August 30th his office served a copy of this temporary restraining order upon the petitioners Curtis, Clay, Marian Oldham, Richards, Perkins, Seay, and Thompson. The return also recites the service upon 3 other persons not herein petitioners, and that he also delivered copies to "* * * eleven unknown persons (John Doe) located in the vicinity* * *" of the bank.

The temporary restraining order required the defendants to "desist and refrain" from the following acts until the hearing of and ruling upon the order to show cause:

> "(a) Physically hindering, obstructing, interfering with, delaying, molesting or harassing other persons desiring to enter plaintiff's banking premises, from entering said premises for the purpose of conducting their business with plaintiff or for any other purpose.
>
> "(b) Congregating or loitering individually or in groups inside plaintiff's banking premises and therein engage in any acts or conduct of whatsoever character which interferes with, intimidates, harasses, hinders and annoys plaintiff's employees in the performance of their duties or other persons in the conduct of their business with plaintiff or which in any way interferes with the proper and normal conduct of plaintiff's banking business.

"(c) Physically hindering, obstructing, interfering with, intimidating or in any other manner preventing customers or plaintiff and other members of the public from having the usual and customary access to tellers' windows located in plaintiff's banking premises or access to any other department or portion of said banking premises wherein plaintiff conducts its banking business."

The temporary restraining order required a bond in the amount of $10,000.00 and the records of the court show this bond posted and approved. The injunction bond need not herein be set out, but will be specifically referred to later in connection with the petitioners' contentions that it was fatally defective.

We pass now to a consideration of the nine applications consolidated in 31,777. On the 29th of August when the bank filed its verified petition for the temporary restraining order, the court caused the petitioner Charles R. Oldham to be notified. He appeared before the court and, being an attorney, entered his appearance as attorney for the St. Louis Committee of Racial Equality. The court, by agreement with Oldham and the bank's attorney, set a hearing on the restraining order for 10 a.m., August 30th. At that hearing the petitioner, Raymond Howard, an attorney and also a member of the St. Louis Committee of Racial Equality, entered his appearance on behalf of petitioners Charles and Marian Oldham, Curtis, and also on behalf of 3 others not now petitioners.

The verified petition for the citation for contempt recites the application for a restraining order and the entry of appearance by Oldham and that by Howard. It further states that the court had issued a restraining order, the bond had been posted, and Howard advised that the restraining order was in full force and effect by 4 p.m. on August 30th. It then reads as follows:

"7. That at approximately 4 o'clock P.M. August 30, 1963, certain of the defendants appeared at plaintiff's place of business accompanied by more than one hundred persons, including children, and acting in concert and under the direction and supervision of the defendants herein named, sang, paraded, chanted and shouted in and around plaintiff's place of business, locked arms in front of the entrance to plaintiff's place of business, entered in and upon plaintiff's place of business and did then and there walk in, sit in and lie in the lobby of plaintiff's place of business so that the customers of the plaintiff were prevented, hindered and delayed from having access to the tellers' windows at plaintiff's bank and congregated and loitered individually and in groups forcefully and unlawfully inside plaintiff's banking premises, all in violation of the Temporary Restraining Order of this Court entered as aforesaid."

The petition for the citation then alleges that the petitioners were each personally served with a copy of the restraining order or, in the alternative, had notice of that order by having it read to him or her; that these petitioners intentionally violated the restraining order even though they had full and complete knowledge of the order; that acts which were performed by petitioners were accomplished while the petitioners had full knowledge that those acts constituted a violation of the restraining order; and that the petitioners' acts were for the deliberate purpose of "defeating" the restraining order and constituted a "direct, willful and deliberate violation"of that order. The prayer was that a citation for contempt be issued, directing the petitioners Curtis, Clay, Oldham, Mrs. Oldham, Richards, Perkins, Seay, Thompson and Howard to appear on September 3, 1963 and show cause why they "* * * should not be punished for said contempt and why your petitioner should not recover its costs and expenses herein and in its behalf, including attorney's fees to be allowed by this Court, and why the Court should not make such other orders and give such other relief as may be

just and proper in the premises." This citation was issued and the Sheriff's return shows it was executed on the 31st day of August by "* * *attaching and taking into my custody the following persons listed herein, Marian Oldham, and Herman Thompson, Robert Curtis, William L. Clay, Charles Oldham, Lucien Richards, Rev. Charles Perkins, Norman Seay and Raymond Howard * * *."

It appears from the judgment that the hearing set in the circuit court for September 3rd was postponed to September 4th due to a hearing to be held on the 3rd before this court on a petition for habeas corpus filed by the petitioners Seay, Perkins, Richards, Charles Oldham, and Curtis. These petitioners had not given bond as had the other petitioners and were being held in jail pending the hearing of September 3rd. On September 4th, the hearing on the citation was again postponed due to an application for a writ of prohibition filed in this court. That matter being disposed of by the filing of the mandate of this court denying the writ, the causes were passed by consent until September 9th. On the 9th, the hearing was laid over until September 23rd.

On the 11th of September, the circuit court ordered separate notices of the contempt proceedings that had been filed that day and served on each of the petitioners. These notices were not signed by the court and did not state any definite time or place where the petitioners were to appear. However, the court's records show that they were ordered returnable on September 23rd. On September 18th, the court entered an order appointing "* * *Wayne L. Millsap to prepare and file for the approval of the court and service * * *" on the petitioners a notice of contempt proceedings instituted against them

which was to be returnable September 23rd. These notices were prepared and the docket entry on the 23rd shows registered mail receipts from the petitioners and/or their attorneys of record of service of these notices. The Sheriff's return also shows service of the notices of the 18th upon each of the petitioners. The notices of the 18th ordered the petitioners to appear in "Division No. 2, Circuit Court of the City of St. Louis, State of Missouri, Twelfth and Market Streets, St. Louis, Missouri, at 10:00 a.m. on September 23, 1963, and show cause why you should not be punished as for criminal contempt." The notices of the 18th and of the 11th are otherwise identical. Each recites the restraining order and contains the following language: "You are hereby charged with willful disobedience of said Restraining Order, lawfully issued, in the following particulars, and with full knowledge and notice of said Restraining Order." The particulars therein referred to are set forth and are the same in each set of notices. These consist of 4 paragraphs charging that the petitioner named in the notice: (1) conspired to cause others to violate the restraining order; (2) directed, controlled, supervised and planned the demonstration so as to cause the violation of the restraining order; (3) having the right to direct, control, supervise and plan the activities of the St. Louis Committee of Racial Equality; failed to so direct, control, supervise, and plan those activities as to cause the violations of the restraining order to cease; and (4) that the petitioner aided, abetted and counseled others to violate said restraining order by engaging and participating in the violations.

The trial began on September 23rd and continued from day to day until its conclusion on October 3rd. The court took the matter under advisement and indicated it would enter its judgment on the 24th of October.

While the recitals contained in the findings of fact and judgment differ somewhat as to each petitioner, there are certain findings that are common to many of the petitioners and other findings common to all of them. All 9 petitioners were found to have been served with a copy of the restraining order prior to the time when the demonstrators took any steps to stand in front of the bank doors or enter into the bank premises. All of the petitioners except Howard, Richards, and Charles Oldham were found to have been present at a meeting which took place on the parking lot adjacent to the scene of the demonstration where they were informed by the petitioner Howard of the contents of the restraining order and advised by him to comply with that order. The petitioners Marian and Charles Oldham, Curtis, and Richards were also found to have been personally represented by Howard at the hearing on Friday, August 30th, when the restraining order was issued and delivered to Howard at about 1:55 p.m. on that day.

The manner in which these petitioners were found to have willfully disobeyed the restraining order varies somewhat. In this regard, the findings as to Richards, Perkins, Clay, Curtis and Seay are the most extensive. They are identical and read as follows:

> "It is further found that defendant, Rev. Charles Perkins, with full knowledge and notice, as aforesaid, and acting in concert and participation with and aiding and abetting one or more of the persons named as defendants in the aforementioned Jefferson Bank and Trust Company vs. Robert Curtis, et al., did willfully disobey and violate said restraining order by:
>
> "(1) Conspiring with others to violate said Restraining Order by appearing on the 30th day of August, 1963, at the Jefferson Bank and Trust Company, 2600 Washington Avenue, St. Louis, Missouri, with a crowd of more than one hundred persons, including children, and then and there singing, chanting, parading, shouting, and milling about in and around said Bank premises, and causing others to do so; conspiring with others to cause said crowd, or part of them,

to lock arms in front of the entrance to the Bank premises so as to bar entry to and exit from said Bank; conspiring with others to cause said crowd, or part of them, to enter said Bank and sit in, lie in and otherwise obstruct the lobby of said Bank so that customers were prevented, hindered and delayed from having access to tellers' windows and otherwise transacting their lawful business; conspiring with others to cause said crowd of persons, or part of them, to congregate individually and in groups unlawfully inside said Bank.

"(2) So directing, controlling, supervising and planning, while said Restraining Order was in force, as a representative of the St. Louis Committee of Racial Equality with the right to direct, control, supervise and plan the activities of said Committee, as to violate said Restraining Order by causing members of said Committee and others: to sing, parade, chant, mill about and congregate in and around said Bank; to enter said Bank and sit in, lie in, and otherwise obstruct the lobby of the Bank, preventing, hindering and delaying customers from access to tellers' windows and other portions of the premises; to bar entry to and exit from said Bank by locking arms in front of the entrance; and to congregate and loiter individually and in groups unlawfully inside said Bank.

"(3) Failing, while said Restraining Order was in force, as a representative of the Committee aforesaid, with the right to direct, control, supervise and plan the activities of said Committee and its members, and knowing that members of said Committee were violating said Restraining Order, to so direct, control and supervise said activities as to cause said violation to cease and desist.

"(4) Aiding, abetting and counselling others to violate said Restraining Order by engaging and participating in the conduct aforesaid.

"It is further found, adjudged and decreed that the aforesaid acts and conduct constitute offenses against the majesty of the law and the dignity and authority of this Court.

"It is further found, adjudged and decreed that defendant, Rev. Charles Perkins, is guilty of willful disobedience of said Temporary Restraining Order, and is punishable as for criminal contempt."

The petitioner Thompson was not found to have disobeyed the restraining order as stated in paragraph 4 of the findings set out above. The petitioners Charles Oldham, Marian Oldham and Howard were not found to have disobeyed the restraining order as stated in paragraphs 2 and 4.

The fines and sentences imposed by the court vary among the petitioners. Each of the petitioners was assessed one-ninth of the costs. The petitioner Curtis was sentenced to 270 days in jail and assessed a fine of $1,000.00; Mrs. Oldham, Thompson and Howard each received 60 days and a fine of $500.00; Richards received a sentence of 90 days and a fine of $500.00; Charles Oldham, 90 days and a fine of $1,000.00; Perkins was sentenced to 180 days and a fine of $500.00; Clay, 270 days and a fine of $1,000.00; and the petitioner Seay was sentenced to 90 days and a fine of $500.00.

The applications to this court for habeas corpus followed the events summarized above and those later herein summarized relating to those applications consolidated in 31,778 and 31,779. We issued the writs and, in compliance therewith, the respondents brought the petitioners before us. We released the petitioners on bond and set the hearing for the 12th of November, granting counsel leave to file their pleadings and suggestions before that date. The hearing before this court consisted of offering in evidence the exhibits, transcripts and other matters that were before the trial court. These we received subject to the objections that were made during the contempt proceedings in the circuit court. The respondents have objected to the consideration by this court of the transcripts and evidence introduced at the proceedings in the circuit court on the ground of relevancy. Their theory is that this court is bound by the recitals of the judgment entered and cannot look to the facts. Following the hearing, counsel again requested time to file their suggestions and we granted them leave to do so. The last of these was filed in this court on November 26, 1963.

It is necessary to look at the pleadings to determine the issues these proceedings present for our determination. The writs having been issued, the applications for habeas corpus pass out of the cases and the returns to the writs and the traverse thereof form the issues. State ex rel. Burtrum v. Smith, Mo., 206 S.W. 2d 558; Label v. Sullivan et ux., Mo., 165 S.W. 2d 639. In this connection, it should be noted that the answers filed by the 19 petitioners are not in compliance with the provisions of § 532.320, RSMo 1959, V.A.M.S., or of Rule 91.28, V.A.M.R. Both the statute and the rule require the answer to be on the oath of the petitioner. The answer in 31,777 was jointly filed on behalf of the 9 petitioners whose applications for writs of habeas corpus were consolidated therein. The same is true of the 7 petitioners whose applications are consolidated in 31,778, and of the 3 petitioners whose applications are encompassed within 31,779. In each of these 3 joint answers, the verification is by the attorneys for the petitioners. Verification by attorney for the petitioner has been held not to be in compliance with the statute, Gugenhine v. Gerk, Mo., 31 S.W. 2d 1, and to result in the allegations of the return being taken as true. Ex parte Davis, Mo., 62 S.W. 2d 1086. However, the situation in the instant cases is analogous to that in Label v. Sullivan, supra. In that case, petitioner failed to file any pleading traversing the return. Pointing out that it is the law in this state, Ex parte Bass, Mo., 40 S.W. 2d 457, that a habeas corpus matter may be heard on the petition alone if the parties join in so submitting it, the court in Label v. Sullivan, supra, held that respondent therein had waived the petitioner's failure to traverse the return by raising no point about it and by joining issue on the petition, return, and an agreed statement of facts. Certainly the same is true in the instant proceedings.

The respondents have not raised any point regarding the verification of the answer and, in fact, have joined issued upon it by having requested and received our leave to file a joint reply to each joint answer. We hold the respondents have waived any objection to the form of the verification of the answer and have joined issue thereon.

The reply which we granted respondents leave to file is merely a general denial of the allegations of the answer. It follows that, due to the waiver of the deficiencies of the answer as above noted, the issues for our ruling are encompassed within the respondents' returns and petitioners' traverse thereof as found in their joint answers.

The returns filed by the respondents state that the Sheriff took custody of the petitioners pursuant to the commitment orders issued by the circuit court and had transferred custody of the petitioners to the Warden when served with our writs. True copies of the commitment orders were attached to each of the returns filed by the Sheriff. As agreed by counsel, the return filed by the Warden did not include any such orders but reference was made therein to the orders attached to the Sheriff's returns.

The answers present a far more complicated picture. This for the reason that the petitioners evidently assumed that whatever matter was contained within the joint answer filed in one of these three cases applies equally to all the petitioners. Of course, this is not so. The joint answer filed by each of these groups of petitioners applies only to that group. Equally confusing is the fact that when a point is stated in one answer and therein divided into sub-points, some of the sub-points will not appear in

the other answers although they contain the same contention. However, giving the joint answers the liberal reading and construction we think the high purpose of the writ requires, it is possible to determine certain matters which are common to all the answers even though the matter may not be expressed in the same language or expounded at the same length and detail in such answer. These we will deal with in our consideration of the applications consolidated in 31,777. Our rulings thereon will also dispose of those issues with respect to 31,778 and 31,779. These matters are: (1) the application being for civil contempt, the circuit court lacked jurisdiction to try the petitioners for criminal contempt; (2) the petitioners' contentions with regard to the right of this court in a habeas corpus proceeding to go behind the recitals in the judgment and commitment to determine whether there was present a lack of jurisdiction in these cases owing to the facts thereof; (3) the restraining order was void for lack of service and for other reasons to be set out when this point is herein ruled; (4) the contention that the indemnifying bond was defective; (5) defects in the attachment order render it void; (6) that the circuit court lacked jurisdiction due to the existence of a labor dispute within the meaning and interpretation of the Federal statutes relating to labor relations; and (7) the contentions that the punishment adjudged by the circuit court constitutes cruel and unusual punishment within the meaning and prohibition of the I, V, VI, VIII, and XIV Amendments of the Constitution of the United States and of the §§ 8, 9, 10, 18a, and 21 of the Constitution of Missouri, although of what article of that Constitution those sections are from was not given. Presumably petitioners refer to Article I.

In addition to these matters common to all three files the petitioners whose applications are consolidated into 31,777 also advance certain contentions with regard to the necessity for and the propriety of the appointment of the special counsel appointed by the court to assist in the presentation of this case.

It is first necessary to delineate clearly the particular offense with which we are here dealing. The petitioners contend that the circuit court lacked jurisdiction to try them for criminal contempt and to find them guilty of such offense because the application for the contempt citation and the entire conduct of the trial show that these proceedings were, in fact, for civil contempt.

It has been said that contempts logically arrange and divide themselves into four classes: civil and criminal, direct and constructive or indirect. Ex parte Clark, Mo., 106 S.W. 990. A direct contempt is one that occurs in the presence of the court or so near as to interrupt its proceedings. If the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court, a direct contempt may be punished summarily. It is so provided by rule in this state (Rule 35.01, a, V.A.M.R.) and was the law prior to the adoption of that rule, Ex parte Clark, supra; and see cases collected Mo. Digest, Contempt, Key 6. Constructive or indirect contempt arises from matters not transpiring in court but which go to degrade or make impotent the authority of the court or to impede or embarrass the administration of justice. State ex inf Crow v. Shepherd, 177 Mo. 205, 76 S.W. 79;

Holt v. McLaughlin, Mo., 210 S.W. 2d 1006;Ex parte Clark, supra; and see cases cited Mo. Digest, Contempt, Key 2. The procedure in cases of constructive or indirect criminal contempt which may not be punished summarily is set forth in Rule 35.01, b, V.A.M.R.

The line of demarcation between criminal contempts and those that are civil in nature is indistinct and confusing. 17 C.J.S. Contempt, Sec. 5(2); 12 Am. Jur. Contempt, Sec. 6. For all practical purposes Rule 35.01,(b), V.A.M.R., governing criminal contempt actions in this state is the same as Rule 42(b), 18 U.S.C.A., dealing with the same matter in the federal practice. It has repeatedly been held that in actions for criminal contempt brought under the federal rule technical pleadings are not required. Bullock v. United States, 265 F. 2d 683. A strict compliance with the rule is not necessary. United States v. United Mine Workers of America, 330 U.S. 258, l.c. 295-301. The same result was reached in Osborne v. Purdome, Mo., 244 S.W. 2d, l.c. 1012 where it is said that there is no fixed formulae for contempt proceedings which are sui generis and do not require technical accuracy. Criminal contempt embraces acts committed against the majesty of the law and that the primary purpose of punishment for criminal contempt is the vindication of public authority. Ex parte Clark, supra; see also Mo. Digest, Contempt, Key 3 - Criminal Contempt, Key 4 - Civil Contempt.

The petitioners rely upon the language of the application or motion for attachment which they contend illustrates this proceeding to be for civil contempt. There are at least two answers to such an argument. The first is that there are contempts in which both elements appear, civil and criminal. State v. Bland, Mo., 88 S.W. 28. In

Limerick v. Riback, Mo. App., 224 S.W. 45 at l.c. 46, criminal contempt was held applicable to acts in violation of an injunction. The court held:

> "* * * It is true that civil contempt proceedings are for the purpose of protecting the property rights of private parties, or for the benefit of the opposing party in a civil action, but it is equally well established that there may be in a civil case to protect private property rights a contempt in a punitive sense to vindicate the supremacy of the law and to punish for a completed act of disobedience."

That is true in the instant case for there can be no doubt that the Jefferson Bank and Trust suffered pecuniary loss as a result of these demonstrations at the same time the dignity and authority of the circuit court and the majesty of the law were likewise suffering.

It should be noted that the application charges a "willful and deliberate" violation of the restraining order and that the prayer of the application requests the court to order the petitioners to show cause why they "* * * should not be punished for said contempt and why your petitioner should not recover its cost and expenses herein* * *" (emphasis supplied). In United States v. United Mine Workers, supra, the petitioner for contempt charged a "willful and deliberate" violation of the restraining order and prayed that the contemnors be "punished." The court then stated that the use of the word "punished" could well be held adequate notice of a proceeding for criminal contempt, referring to Moskovitz, Contempt of Injunction, Civil and Criminal, 43 Col. L. Rev. 780, and also held that the use of the term "wilfully and deliberately" indicates an intention to proceed as for criminal contempt. The petitioners are incorrect in their contention that the application for the contempt citation illustrates the civil character of this proceeding. In cases 31,778 and 31,779, the motions instituting those proceedings do not contain any requests for civil relief.

The second answer to such a contention is that the language used in the application or petition can hardly be said to be determinative of the essential character of the proceeding. Once the application or motion is ruled on, it passes out of the case. The essential question is whether the petitioners had notice of and understood they were to be tried for criminal contempt. There can be no doubt of that matter in the instant case. The notice of September 11th and that of the 18th, served upon each of the petitioners, clearly called upon them to "show cause why you should not be punished as for criminal contempt." These notices also contained the statement that the petitioners' actions constituted "offenses against the majesty of the law and the dignity and authority of this court." Moreover, these notices were read aloud in open court to each petitioner. This and the other requirements of Rule 35.01, supra, were strictly complied with. No one can read this transcript and come to any conclusion other than these petitioners and their counsel clearly understood the nature of this proceeding to be for criminal contempt.

The petitioners rely upon Gompers v. Buck's Stove and Range Co., 221 U.S. 418. No comment is necessary as to the vitality of that decision in view of the United Mine Workers decision for the case does not support the petitioners' contentions. In Gompers the court held that one of the more important tests to determine criminal as distinguished from civil contempt was the character and purpose of the punishment. Gompers v. Buck's Stove and Range Co., 221 U.S. at 441. It was cited for this ruling in the United States v. United Mine Workers, 330 U.S. at 297. In Carder v. Carder, Mo. App., 61 S.W. 2d 389, the court distinguishes criminal and civil contempt by quoting with approval from the Gompers case as follows:

> "'"* * * The order for imprisonment in this class of cases, therefore, is not to vindicate the authority

of the law, but is remedial and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said in Re Nevitt [C.C.A.] 117 F. 451, 'He carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.

"'"On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience."'"

The petitioners did that which they had been commanded not to do. Their acts were not threatened; their disobedience was a thing already accomplished. The imprisonment and fines to which they were sentenced was in no way coercive but was intended to and did operate solely to vindicate the majesty of the law and punishment for the petitioners' completed acts of willful and deliberate disobedience. The petitioners had notice that they were to show cause why they should not be punished as for criminal contempt and were warned in the notice served upon them and read to them in open court that the offenses with which they were charged constituted offenses against the majesty of the law and the dignity and authority of the court. It follows that what is here involved are acts of criminal contempt.

The petitioners' next contention is that in a habeas corpus proceeding testing the legality of the restraint arising from a conviction for criminal contempt, this court has authority to go behind the recitals in the findings and examine the evidence. They further contend that, upon doing so, we will find the evidence

will not support the recitals. Based upon their allegations in this regard, the petitioners urge that the trial court did not have jurisdiction to render the particular judgments it entered. The respondents' position is that this court is conclusively bound by the recitals in the judgment and that in this proceeding we cannot inquire beyond whether the committing court had jurisdiction over the subject matter and over the persons of the petitioners. The respondents also contend that this court is forbidden to look behind the recitals in the judgment by the provisions of Rule 91.35, V.A.M.R.

Ex parte Clark, supra, involved what was specifically held to be a constructive or indirect criminal contempt. After reciting the rule that there was no appeal in such cases, the court held (106 S.W. 990, l.c. 997):

> "* * * no appeal lies and no writ of error may go. State ex rel. v. Bland, supra. Absent such remedy, what was said in that case (page 207 of 189 Mo., page 30 of 88 S.W.) is applicable here, to wit, that where no statutory right of appeal exists or writ of error lies courts having superintending control have been astute and diligent in granting relief by inspecting records under writs of certiorari or habeas corpus. Ex parte O'Brien, supra; State v. Leftwich, 41 Minn. 42, 42 N.W. 598; In re Watts & Sachs, 190 U.S. 1, 23 Sup.Ct. 719, 47 L.Ed. 933."

It is with respect to the extent of our inspection of the records of the proceedings before the circuit court that this court must necessarily concern itself.

The Supreme Court of this state in the case of Ex parte Creasy, 243 Mo. 679, 148 S.W. 914, specifically held that in a habeas corpus proceeding arising out of an indirect criminal contempt proceeding, it had authority to go behind the recitals in the judgment and to make

the inquiries and determinations the petitioners would have this court make. Its ruling and a portion of the rationale therefor are to be found in the following excerpt from the opinion (148 S.W. 914, l.c. 916 [1]):

> "[1] 'I. First, I do not agree that the judgment of the court nisi in contempt proceedings is conclusive in this court upon the facts, when issues as to the facts are made upon the hearing of the writ of habeas corpus. The writ of habeas corpus has a peculiar constitutional sanctity, which this court will not permit to be frittered away by any judicial ascertainment of the facts, except the ascertainment made by the court trying the case under this peculiar writ of right. Our constitutional provision as to writ of habeas corpus has a deep-seated meaning. It was lodged there for the sole purpose of affording one deprived of liberty the right to have the cause of his detention investigated, and, too, whether such detention was upon the judgment of a court, or was upon some other alleged authority. To say that the committing court in contempt proceedings can absolutely conclude an investigation of the facts by the tribunal hearing the writ of habeas corpus is giving the judge whose court has been the target of an alleged contempt more power than our Constitution ever contemplated. If such be the law, the only thing left for the court hearing the writ of habeas corpus is to determine whether the judgment and writ of commitment are regular upon their face. If they are, then the prisoner must be remanded, it matters not how flagrantly the offended judge may have disregarded the facts. Judgments in contempt proceedings are in a measure different from other judgments. They are judgments entered by one not altogether disinterested. They may not be cool, dispassionate judgments, but may be shaded by the feelings of one presiding over a court thought to have been outraged by the conduct of a person in attendance upon such court. Human liberty is too sacred under our Constitution to say that under a judgment emanating from such a source the actual facts are not for review in the court trying the writ of habeas corpus. Mere jurisdiction of the person and the subject-matter is not and should not be the test of a valid judgment in a contempt proceeding. This is the test in ordinary judgments, but out of respect for constitutional provision with reference to the writ of habeas corpus many courts have gone further, and, as to contempt judgments, have said that, in order to sustain the

> contempt judgment, it must not only be shown that the court had jurisdiction of the person, and of the subject-matter - i.e., contempt - <u>but that it must be shown that under both the law and the facts the particular judgment could be sustained</u>. A learned discussion of this exact point is found from the pen of Davidson, P. J., of the Texas Court of Criminal Appeals, in the case of Ex parte Duncan, 42 Tex. Cr. R. 661, 62 S.W. 758.'" (Emphasis ours.)

It will serve no useful purpose to herein set out the lengthy quotation from the Texas case cited. It appears in the Creasy opinion and can be read there or in the original version. It should suffice to say that opinion contains an extensive and comprehensive review of the law on the point from various states of the union. It is well worth reading not only for the cases cited, but for the soundness of its reasoning. For the latter purpose, the following quotation from the Creasy case is of such importance that its length must be overlooked (148 S.W. 914, l.c. 920):

> "[2] 'We are firmly of opinion that, as to contempt judgments, such judgments can be attacked in habeas corpus for (1) want of jurisdiction over the person; (2) want of jurisdiction over subject-matter; and (3) want of jurisdiction in the particular case owing to the facts thereof, although the first two requisites are fully met. In other words, as said by the Texas court "nor can the court make contempt of that which is not contempt; and every attempt to do so would be in excess of authority or jurisdiction, as much so as if the court had no authority or power to punish for contempt, either in relation to the person or subject-matter. There must be contempt in order to justify punishment for that offense." Proof that there was in fact no contempt should avoid the judgment. We are aware that there are generalizations in the books, which appear opposed to this dictrine, but, if we are to give full vitality to the constitutional writ of habeas corpus, such should be the law. If not, the hearings upon writs of habeas corpus become mere perfunctory proceedings in which we determine a mere paper case; i.e.: (1) Has the court jurisdiction of the person and subject-matter, and (2) has the court (whether truly or falsely) recited facts enough to constitute

contempt? Such a hearing would be far from the hearing so forcefully put by our Brother Lamm, in Clark's Case, supra, when he said: "Wherefore, when the great writ goes down - a writ whose origin is beyond the dawn of English history, whose final and triumphant establishment was a landmark in the evolution of civil liberty, making the hearts of lovers leap for joy - to the prisoner the doors of jails open, he comes into court with his shackles dropped, and the cause of his imprisonment, the very marrow of it, is laid bare to the utmost verge and minutiæ permitted by written law." The italics are ours. Prison doors are but temporarily opened, if under this great and benign writ we are bound by the mere ipsi dixit of a judge finding for us the facts: The leaping of hearts for joy would only last long enough for the prosecutor to read a false finding of fact in contempt wherein there was no contempt. There the "very marrow" of the cause of the imprisonment might be fully shadowed by a perverse finding of facts, which would prevent its being "laid bare."'"

Seizing upon the language in the excerpt above set out regarding a contempt judgment as being one entered by a person not altogether disinterested and the possibility that such a judgment may be shaded by the outraged feelings of the judge in whose court the contempt occurred, the respondents contend such language constitutes the real basis for the decision. In support of that argument, the respondents cite Ex parte Howell, Mo., 200 S.W. 65, a case decided 6 years after the Creasy decision. We cannot agree. In the first place, such an argument totally ignores the real rationale for the Creasy case as stated in the excerpts set out herein. While we regret the length of those excerpts, we have nevertheless included them so that it might be clearly understood that the language respondents contend furnishes the basis for that opinion is but a crutch to the sound leg upon which that decision stands. In the second place, Howell and Creasy involved different classes of criminal contempt. In Creasy, the recitation was that the contempt took place in the court's presence. However, when this recital came before the court in the subsequent habeas corpus proceeding, the Supreme Court specifically held that the contempt involved was indirect or constructive, stating:

> "'In this case the commitment recited that the contempt occurred in the presence of the court, when, as a matter of fact,as shown by proof aliunde in controversion of the terms of the commitment, that the alleged acts were not in the presence of the court.* * *'"

Accordingly, the Creasy case is not one involving direct contempt but was, in fact, a case of indirect criminal contempt as are the cases here involved, while the Howell case was, in fact, a case of direct contempt. Since the Howell case involved a type of contempt not involved in the instant case, the pertinence of that case to our inquiry can only be that by the opinion in the Howell case handed down some 6 years later, the Supreme Court of this state extended the rule announced in the Creasy to cases involving direct contempts. The Howell case in no way affects the force and effect of the Creasy decision upon the conclusiveness of the recitals in the judgment in a case of indirect contempt.

However, even if the Howell and Creasy cases were not so distinguishable, we could find no merit in respondents' contention. A careful reading of the Howell opinion affords convincing proof that the rationale of that case is not the makeweight argument that the court is allowed to go behind the recitals of the judgment to avoid the unfairness that may arise from judicial passion and prejudice. The true basis for the Howell opinion is to be found in that portion of the opinion preceding the court's remarksupon which the respondents rely. There the court said (200 S.W. 65, l.c.68):

> "Absent the right of appeal, no opportunity for a full review of the proceedings is afforded, except by habeas corpus. Resort to the writ of certiorari, sometimes employed in other jurisdictions, will not afford relief because, as is not infrequently the case, the proceedings concurrent with and provocative of the judgment for contempt, are not preserved in

> the record, and hence cannot be brought up for review. By invoking the aid of habeas corpus, however, which is always construed in favor of the liberty of the citizen, an opportunity is afforded, in a case of the character here under consideration, to look beyond the commitment and its recitals which the court below acted, and determine therefrom, although jurisdiction of the person and subject-matter be conceded, whether the court had authority to render the judgment, or generally whether the third essential to the court's right of action existed.* * *"

The rationale for the Howell decision is clearly the same as that for the Creasy decision.

However compelling Creasy may be, our decision that we are not bound by the recitals in the judgment does not rest solely upon that decision. In Osborne v. Purdome, Mo., 250 S.W. 2d 159, (see also Osborne v. Purdome, Mo., 244 S.W. 2d 1005), the contempt did not take place in the presence of the court. Having been found guilty of contempt, Osborne brought his application for habeas corpus before the Supreme Court of this state sitting en banc. In the habeas corpus proceeding, the petitioner raised the contention that the evidence was insufficient. The Supreme Court reviewed the evidence and determined for itself the sufficiency thereof. Its action in that regard constituted a clear sub silentio ruling that it had authority in a habeas corpus proceeding to make such an inquiry and determination and was not bound by the recitals in the judgment.

In addition to the direct rulings of the point found in Creasy, supra, and in Osborne, supra, there have been numerous recognitions that such was indeed the law. See Holt v. McLaughlin, supra, l.c. 1007 [4,5], where the court, in speaking of all criminal contempt cases, stated "* * * a full review of such proceedings is afforded by habeas

corpus.* * *" In the Howell opinion, supra, l.c. 69, the court refers to Ex parte Clark, supra, as "impliedly" endorsing this principle. As stated earlier herein, Clark involved a case specifically held to present indirect contempt. See also Threlkel v. Miles, Mo. en banc, 10 S.W. 2d 953, l.c. 956 [7], and Ex parte Devoy, Mo. App., 236 S.W. 1070, l.c. 1072 [1], [2], where this court held:

> "In Ex parte Creasy, 243 Mo. 679, 148 S.W. 914, our Supreme Court established the proposition that the judgment of the circuit court committing a person for contempt is not conclusive upon the facts, but that such facts may be inquired into in the court of which the writ of habeas corpus issues."

Compare Ex parte Cloud, Mo. App., 18 S.W. 2d 562, l.c. 563.

This court's decision to go behind the recitals of the judgment finds support in logic and sound reasoning as well as in the case law referred to in the preceding portion of this opinion. For example, to rule otherwise would render useless the clearly stated requirements of § 476.140, RSMo 1959, V.A.M.S., and of Rule 35.01, b, V.A.M.R. The statute requires that where a person shall be committed for contempt "* * *the particular circumstances of his offense shall be set forth in the order or warrant of commitment." The rule requires that "Upon a finding of guilt the court shall enter an order reciting the essential facts constituting the criminal contempt and fixing the punishment." The appellate courts of this state have repeatedly held that the facts and circumstances constituting the offense, and not simply the legal conclusions of the court, must be recited not only in the judgment but also in the commitment regardless of whether the contempt arose out of conduct or action before the court or outside of its presence. Glenn v. Hendrix, Mo. App., 349 S.W. 2d 532, l.c. [2,3]. If as respondents contend, there is no possibility of going behind

the recitals of those orders, then there would be no reason for the statute and rule to so carefully require them to include the facts and circumstances of the contempt rather than the legal conclusions the committing judge draws therefrom. Neither would there be any purpose in the explicit enforcement of that requirement by the appellate courts of this state. Glenn v. Hendrix, supra. To the contrary, if respondents be correct, it would seem that the conclusions of the committing judge would be clearly sufficient. They are not and this helps persuade us that our decision is soundly reasoned.

Another example of such persuasive matters is one mentioned in the Creasy case. It is that § 532.320, RSMo 1959, V.A.M.S., seems to encompass controversy as to issues of fact. That section is the same as § 2468, R.S. 1909, in force when the Creasy opinion was handed down, and reads:

> "The party brought before any court or magistrate, by virtue of any writ of habeas corpus, may deny the material facts set forth in the return, or allege any fact to show, either that his detention or imprisonment is unlawful, or that he is entitled to his discharge; which allegations or denials shall be on oath."

This language is substantially the same as that of Rule 91.28, V.A.M.R. In the Creasy opinion (148 S.W. 914, l.c. 920), the court relied upon the provisions of this section, stating: "* * * Furthermore, our statute (section 2468, R.S. 1909) seems to contemplate the practice for which we contend* * *" and pointed out that the petitioner in that case did so plead. So it is in the instant cases. The petitioners' pleadings in this case constitute complete denials of the material facts alleged in the return and, moreover, allege other facts by which petitioners contend their detention is unlawful and they are entitled to be discharged.

Still another example of persuasive argument why this court should not be bound by the recitals of the judgment was given in Creasy and is equally of force in the instant case. In that opinion the court said (148 S.W. 914, l.c. 920):

> "'If former adjudication in another habeas corpus proceeding will not estop a subsequent inquiry as to facts surrounding the detention of a citizen, why should it be said that the findings of fact made by the presiding judge of the court against which the offense of contempt was committed would forever seal the lips of a petitioning citizen from showing the facts surrounding the judgment committing him? If the high character of the writ under the Constitution is such as to preclude the doctrine of res adjudicata, so long as the petitioner is in custody, why should not the same rule apply to facts surrounding and entering into the particular judgment?'"

also

The respondents contend that by Rule 91.35, supra, the Supreme Court has imposed a limitation on the courts of this state preventing inquiry into the recitals in the judgment. Rule 91.35, supra, is identical to § 532.440, RSMo 1959, V.A.M.S. It is the same as § 2475, RSMo 1909 (in force when the Howell case was ruled), and § 5379, RSMo 1889 (in force when Creasy was decided). In the Howell case, it was held that the legislative branch of our government lacks the power to prescribe by statute limitations upon the judicial review of an adjudication of guilt in a criminal contempt proceeding. The respondents admit that this is true of a legislative attempt such as those embodied in § 532.440, supra, and in the previous enactments of that section in force when Howell and Creasy were ruled. However, they urge that Rule 91.35, supra, being a limitation by the judicial branch of government upon its own power, is not subject to the same attack and does, in fact, constitute a valid and enforceable

limitation upon the judicial review of adjudication of guilt in criminal contempt proceedings. Again, there are several reasons why respondents' contention cannot be adopted by this court:

The first is that when it adopted Rule 91.35, supra, the Supreme Court of this state must be held to have done so with the previous judicial interpretations of the language contained therein clearly in mind. As heretofore stated, the rule and the legislative enactments are identical. This language had been held in both Howell and Creasy not to prevent a judicial inquiry into the validity of the recitals in the judgment. By the use of that same language in the rule, the Supreme Court must have intended the same construction to be placed upon it and cannot be held to have intended to place limitations upon the judicial review of criminal contempt proceedings which it had previously found unwarranted, unconstitutional and unenforceable.

Another answer is that the rule making power of the Supreme Court of this state is limited to procedural matters. There can be no doubt but that, if given the interpretation the respondents seek to have us place upon it, this rule would affect substantive matters and thus be beyond the authority of the Supreme Court to promulgate. In spite of the fact that it must be held to have been cognizant of the limitation of its rule-making power, the effect of respondents' argument would be to hold the Supreme Court intended to make a rule affecting substantive matters and thus violative of that limitation upon its authority. We must refuse to make such an unwarranted and illogical assumption.

Finally, we think it well to keep clearly in mind the precise legal point upon which we are ruling. This decision does not change, alter or modify the field of inquiry in every habeas corpus proceeding. It is elementary that this decision must be read in the light of the circumstances of the cases we are ruling, i.e., cases involving indirect criminal contempts. We are in no way extending that rule to any other adjudication or imprisonment from which relief may be sought by habeas corpus. However, as the Howell case makes clear, the rule is the same in cases involving direct criminal contempt. The effect of our decision is that in habeas corpus proceedings brought by one found guilty of indirect criminal contempt, the court to which the application for the writ is made may go behind the recitals of the judgment and determine for itself the accuracy of those recitals and their sufficiency to support the judgment rendered. Ex parte Creasy, supra; Osborne v. Purdome, supra. The reason it is permissible to do so in cases of this nature and why such latitude is not granted to the court considering an application for habeas corpus where the adjudication and imprisonment arises out of matters other than criminal contempt is clear and soundly reasoned. It is that in cases other than criminal contempt, the right of appeal is available. The very matters which the rule we have herein restated allows this court to go into can be reviewed in such cases without the necessity of resorting to habeas corpus. After having the benefit of such a review or having failed to seek such review, the inquiry, upon application for habeas corpus is properly limited to whether the court had jurisdiction over the person and over the subject matter. Lacking that opportunity to secure review in habeas corpus

proceedings where the adjudication and imprisonment results from an act of criminal contempt, the inquiry of the court before which the application for habeas corpus is pending is extended to include a third matter; i.e., want of jurisdiction in the particular case owing to the facts thereof, although the first two inquiries be satisfied. Ex parte Creasy, supra; Osborne v. Purdome, supra. The distinction between the scope of inquiry in habeas corpus proceedings arising out of criminal contempt cases and those that arise out of other matters is dealt with in Sisk v. Wilkinson, 265 S.W. 536, l.c. 538 [5]. Having due regard for the historic character and high purpose of the writ of habeas corpus and keeping firmly in mind the regard our system of law bears toward individual liberty, we can reach no other decision in matters of this nature. As it has been so aptly put (Ex parte Creasy, supra, l.c. 923) "The Constitution guards the liberty of the felon with the same eagle eye that it does the infant and pure girl."

As was stated earlier herein, this court admitted into evidence at the habeas corpus hearing before it the transcripts, exhibits and all other matters that were presented to the trial court. These we took subject to the objections made in the trial court. It would unduly extend the length of this opinion if we were to recite and pass upon each of the objections made during the course of these 3 trials. It is a gross understatement to say these objections were very numerous and the arguments advanced to support each of them were extensive. It suffices to state that in determining the factual situation shown by these transcripts and records, we have accepted the evidence properly admitted and have disregarded that which was properly objected to. We

will state only that evidence bearing upon the recitals contained in the judgment entered as to each petitioner.

As to the first nine petitioners, whose applications are consolidated into 31,777, the facts show that the St. Louis Committee of Racial Equality had regular Sunday meetings. At such a meeting held on August 25, 1963, "direct action" at the Jefferson Bank and Trust Company was discussed with various types of direct action considered. It was formally voted that direct action would be taken against the bank and the actual planning for the demonstration would be done at a special meeting called for Thursday evening, August 29th. How the individual petitioners voted is not shown. At the meeting on August 29th, the petitioner Oldham advised them of the application for a restraining order filed in the circuit court. According to the witness Daly, Oldham explained what an injunction was and that for violation of it, "You could be arrested. That you could be fined or jailed." Mr. Oldham also informed them that the hearing on the motion was to be held on Friday morning, and secured a signed authorization from three of the petitioners (Mr. and Mrs. Oldham and Curtis) for the petitioner Howard to represent them. All the petitioners were present at this meeting with the exception of Howard. After Oldham had told them of the application for the injunction, had explained the possible penalties for violation of the restraining order, and had recommended that if such an order be issued, it be obeyed, a motion was made and carried that a demonstration be held at the bank and that "Several persons were to link arms and stand in front of the doorway of the

bank." The motion also included going inside the bank. At this same meeting, a plan was made whereby "* * * any persons who were willing to be arrested, not knowing the outcome, but willing to do this to block the front door of the bank." By formal action of those present, Curtis was placed in complete charge of the tactics and strategy of the demonstration and Thompson and Richards were designated as captains and placed in charge of the picket lines.

On August 30th, the demonstrators met at the Wheatley YWCA. Under the direction of Curtis, they formed lines, marched to the bank, and began peaceful picketing which continued until about 5:05 or 5:10 p.m. At some time prior to or during this peaceful picketing, a sound movie was taken at the scene. A portion of this movie consists of an interview between a reporter and the petitioner Curtis. In the course of that interview the following question was asked and answer given:

> "'MR. CONDON: Mr. Curtis, do you expect to honor the bank's injunction with this demonstration?
>
> "'MR. CURTIS: Well, we haven't anything to say at all on this issue. We feel that sometimes, while there is an injunction, it is necessary to take extraordinary measures to remedy an extreme situation and I hope, of course, it won't be necessary to violate any Court injunction or even violate the law. But there are times when this becomes necessary and, of course, we hope this will not be necessary today.'"

At approximately 5:05 or 5:10 p.m. a meeting was held on a parking lot adjacent to the scene of the demonstration. This meeting is of importance for the undisputed testimony is that prior to the holding of this meeting the demonstrators made no effort to block the doors of the bank nor to enter the bank. There had been a previous announcement that such a meeting would take place. One witness

testified she was told of such a meeting during the picketing by the petitioner Richards who advised her attendance. Others stated they learned of such a meeting by "the grapevine" or in other ways they could not specifically describe. All the petitioners except Messrs. Oldham and Richards attended this meeting. The petitioner Curtis presided at this meeting and upon introducing Howard told those gathered on the parking lot to listen to him. All the witnesses who testified as to this matter were unanimous that the petitioner Howard advised the group that a restraining order had been issued and urged them not to block the doors or otherwise violate the injunction as to do so would subject them to possible fine and/or imprisonment. Curtis then called for a show of hands of those present who were willing to block the doors of the bank, thereby subjecting themselves to possible arrest. All present raised their hands except Howard. The gathering then dispersed, and some of the demonstrators in attendance went immediately to the front doors of the bank where they blocked the entrance by linking arms and standing in the doorway or standing so close together in the doorway no one could enter or by sitting in front of the doorway.

The testimony is clear that there were people who tried to get into the bank to transact business and could not get past the line of demonstrators. It is also clear that those who did enter the bank had extreme difficulty in doing so and that those who were inside the bank when the entrances were blocked had the same experience when they attempted to leave. There is no testimony that any one of these 9 petitioners linked arms, sat or stood in front of any of the doorways nor that any of them used their persons to physically block the entrances to the bank.

At about 5:25 or 5:30 p.m. the demonstrators first entered the bank itself. They marched around inside the bank; they congregated in front of the tellers' cages; they sang and clapped hands in unison; some sat on the floor and some lay down on the floor. While they were inside the bank, Mr. McConnell, an officer of the bank, read to them a copy of the restraining order and repeatedly asked them to leave the bank. The demonstrators stopped singing and clapping while McConnell read the restraining order to them, but after he asked them to leave the bank, started to sing and clap again. None of the demonstrators left the bank. At approximately 5:50 p.m. the petitioner Curtis came inside the bank, asked for the demonstrators' attention and upon getting their attention and securing quiet, announced that, "We will stay here until six o'clock and then we will go to the Wheatley YWCA."

When the demonstrators left the bank at about 6:00 p.m., a large number went to the Wheatley "Y" where Curtis and a Mr. Williams from East St. Louis complimented them on their courage, and Curtis announced a meeting of CORE for that Sunday evening.

All the petitioners with the exception of Thompson admitted they were served with a copy of the restraining order prior to the time the meeting was held on the parking lot. There was other evidence that all, including Thompson, were so served.

It will be helpful to consider the activities of each of these 9 petitioners. The petitioner Curtis was chairman of the St. Louis Committee of Racial Equality at the time of this demonstration. He presided at the regular meeting of that organization held on the 25th of August when "direct action" was voted against the bank.

He also presided at the strategy meeting of the 29th of August, when it was voted to block the doors of the bank, to go into the bank, and for some of the demonstrators to be arrested. At this meeting the petitioner Oldham got Curtis to give Howard a "signed authorization" to represent him as an individual at the hearing on the issuance of the restraining order. Curtis was formally placed in charge of the entire demonstration, and the evidence of the witness Seay shows clearly that the other petitioners so understood. Curtis admitted this when he was asked, "Now, this entire operation was under your direction, was it not?" and answered, "Yes, it was." At the predemonstration meeting at the Wheatley "Y" Curtis gave instructions to the pickets, and during the demonstration he directed them. His interview with the reporter regarding, as he put it, times when violation of the law becomes necessary, has already been stated. This petitioner presided at the meeting on the parking lot and called for a show of hands to ascertain if there were any present who would subject themselves to possible arrest by blocking the doors of the bank. The evidence is that he held up his hand. At 5:50 p.m. the petitioner Curtis entered the bank and told the demonstrators to leave at 6:00 p.m. and also told them to reassemble at the Wheatley "Y". The demonstrators obeyed his instructions, and at the "Y" Curtis announced a meeting of CORE for that Sunday evening. The petitioner Curtis was asked if he was aware, before it ever occurred, that a sit-in or lie-in at the bank was a violation of the restraining order and answered, "Oh, yes, I was aware of that."

The evidence does not show the petitioner Clay to have been present at the meeting of the 25th, but he was present at the strategy meeting of the 29th of August. He was at the predemonstration meeting at the Wheatley "Y". He was present at the parking lot meeting where he also raised his hand when asked if there were any present who would subject themselves to possible arrest by blocking the doors of the bank. This petitioner stood on the corner of the sidewalk leading to the doors of the bank and motioned a group of pickets into the bank.

Mrs. Oldham was present at the meeting of the 25th and at the meeting of the 29th. At the latter meeting she authorized Howard to appear for her at the hearing on the issuance of the temporary restraining order. She was present also at the predemonstration meeting at the Wheatley "Y" and at the parking lot meeting where she raised her hand when the question was put regarding blocking the doors.

The petitioner Thompson is a former head of the St. Louis Committee of Racial Equality and was present at the meeting of the 29th when the motions to block the doors of the bank and to go inside it were carried. At this meeting he was made a captain in the demonstration and placed in charge of one of the picket lines. He was present at the meeting on the parking lot and raised his hand when Curtis asked for a show of hands on the issue of blocking the doors of the bank. He testified that he was aware that blocking the doors of the bank would interfere with its business.

Mr. Seay was present at both meetings held prior to this demonstration. He attended the meeting on the parking lot and was one

of those who raised their hands when Curtis posed the question as to who would be willing to block the doors. He did go inside the bank but there is no evidence he joined in any of the activities there. It appears that he went into the bank and got 2 children who were participating in the demonstration and brought them outside. At one time, noticing that people were getting into the bank by going in back of the line at the door, this petitioner directed those in the line to back up so that the entrance would be more effectively blocked. Those in the line blocking the door obeyed his instructions.

The petitioner Richards, immediate past chairman of CORE, was present at the meeting of August 25th and also present at the meeting of the 29th. At the latter meeting he was appointed a "captain" in the demonstration and was in charge of one of the picket lines at the bank. He was also present at the predemonstration meeting at the Wheatley "Y". Richards was not present at the meeting on the parking lot, but he directed a demonstrator to attend the meeting. When the demonstrators were in the bank, Richards was with them and participated in the singing and generally milled around inside the bank. He did not sit on the floor or block the doors of the bank. Some of the demonstrators had entered the bank still carrying the signs they had carried while on the picket line outside, and Richards directed them to take the signs outside and then come back.

The Rev. Mr. Perkins was present at the meeting held on the 25th of August and also at the meeting held on the 29th. He was not shown to have been present at the predemonstration meeting at the Wheatley "Y". He was present at the meeting on the parking lot and there raised his hand in response to the call by Curtis for a

show of hands as to who would be willing to block the doors of the bank. This petitioner came inside the bank with the first of the demonstrators to do so and complained loudly about "police brutality" or "sheriff brutality." He milled around inside the bank and, using his arms, directed the singing, but did not sing nor clap hands nor sit on the floor of the bank.

The petitioner Charles Oldham was national chairman of CORE for a period of 5 or 6 years. He was present at the meeting of the 25th of August. He had entered his appearance as attorney of record for the St. Louis Committee of the Congress of Racial Equality on Thursday, August 29th. He went to the meeting of the 29th to advise the group that a petition for an injunction had been filed and explained what an injunction was and the possible penalties for violation of the injunction. He obtained authorization from four of those at the meeting for Howard to represent them as individuals. He also told the meeting that a hearing would be held on the request for a restraining order on Friday morning, and the uncontradicted evidence is that he advised those present against violating the injunction if it was issued. Mr. Oldham was not present at the predemonstration meeting at the Wheatley "Y" nor at the meeting on the parking lot. He never went into the bank nor did he participate in blocking the doors. There is no evidence that he gave any directions to anyone at the scene or acted in any manner that would cause them to violate the restraining order.

The petitioner Howard was present at the meeting held on August 25th but was not present at the meeting held on the 29th of that month. He had entered his appearance in the proceedings

concerning the restraining order as attorney of record for both the Oldhams, for Curtis, and for some others not here petitioners. He was engaged in that proceeding on August 30th, and when it was over went to the scene of the demonstration. Howard spoke to the meeting held on the parking lot and told the group of the issuance of the restraining order and that they would violate it should they block the door, sit or lie in the bank, sing or do anything that would interfere with the business of the bank. The evidence is unanimous and uncontradicted that this petitioner spoke strongly against any violation of the restraining order. He went inside the bank on two occasions. The first was when he first learned the demonstrators were in the bank. He then went into the bank to make certain that no one he represented was in the bank. This was prior to the reading of the restraining order to all the demonstrators in the bank by Mr. McConnell, an officer of the bank. On this occasion he had a conversation with the bank's attorney and with Mr. McConnell. During this conversation he told them that the demonstrations might continue unless an agreement was reached on the bank employing Negroes. The second occasion was when he returned with Curtis at 5:50 p.m., and Curtis made his announcement about the demonstrators leaving at 6:00 p.m. Howard left the bank immediately after his conversation with Mr. McConnell and immediately after the announcement by Curtis. There is no testimony that this petitioner directed anyone at the scene of this demonstration or that he acted in any manner that would cause others to violate the restraining order.

It is readily apparent from the evidence stated above that there was ample evidence to substantiate the court's finding that

the petitioners had been served with a copy of the restraining order prior to the time the demonstrators blocked the doors and entered the bank. It is equally apparent there is ample evidence to support the circuit court's finding that, together with many others not here petitioners, all of the petitioners except Howard, Richards, and Charles Oldham were present at the parking lot meeting. Actually the evidence is clear that Howard was present also and that petitioner so admitted. The same is true as to the finding that Howard there informed them of the issuance of the restraining order (they had already been served with a copy of that order) and advised them against any violation of that order. The evidence is that Howard specifically explained that to block the doors, enter the bank and sit or lie in the bank, to sing or otherwise interfere with the business of the bank was a violation of the restraining order. The petitioners Richards, Marian and Charles Oldham, and Curtis, were found to have been represented by Howard at the hearing on Friday morning, August 30, concerning the issuance of the restraining order. There is no question but that both of the Oldhams and the petitioner Curtis authorized Howard to appear for them. There is no evidence that Richards did so. The court's records do not so show and neither was there any testimony to that effect. However, we do not find this unsubstantiated finding to be of importance since the evidence is clear that Richards was personally served with a copy of the restraining order prior to his entry into the bank and prior to the time when any of the demonstrators first blocked the doors of the bank or entered the bank.

We pass now to a consideration of the specifications of the activities of these 9 petitioners which the circuit court found to

constitute violations of the restraining order. Proceeding logically, it would seem that the degree of proof required to sustain the finding made would depend upon whether the contempt proceeding is regarded as criminal in nature. If so, then the guilt of the accused would require the same quantum of proof as in a criminal proceeding, i.e., beyond a reasonable doubt. Those jurisdictions in which contempt proceedings are regarded as quasi-criminal in nature require a standard of proof greater than a mere preponderance of the evidence but less than beyond a reasonable doubt. 12 Am. Jur., Contempt, Sec. 75. We are spared the difficulties attendant upon putting into words a degree of proof that would be between those poles. In Missouri, although we deny that such proceedings are criminal in nature, Osborne v. Purdome, Mo., 244 S.W. 2d l.c. [8, 9] p. 1012, we require that guilt be proved beyond a reasonable doubt. Osborne v. Purdome, Mo., 250 S.W. 2d l.c. [11] p. 163.

Considering the burden of proof required and, having due regard for the extent of this court's review of the evidence as held earlier herein, this court's duty is to consider the evidence summarized above as to each petitioner. The question is whether that evidence supports the finding, beyond a reasonable doubt, that the petitioner acted as stated in the specifications found as to him or her. In so doing it is unnecessary to consider all the specifications found as to that petitioner. The purpose of the writ is to test the legality of the restraint. It follows that if the determination stated above is supported as to even one of the several specifications contained in the judgment entered as to a petitioner, then that petitioner is not illegally restrained and, as to that individual,

our writ should be quashed. On the other hand, if not even one of the several specifications found as to a petitioner is sustained, beyond a reasonable doubt, by the evidence then that petitioner must be discharged.

The second specification of the findings of fact and judgment entered as to these nine petitioners finds that they directed, controlled, supervised and planned this demonstration, while the restraining order was in force, so as to cause members of their organization and others to violate the restraining order by barring entry to and exit from the bank and by causing others to enter the bank. By the fourth specification these petitioners were found to have aided, abetted and counseled others to engage in the described activities violating the restraining order. There can be no doubt that such activities are punishable for contempt. This is the rule in Missouri. Osborne v. Purdome, Mo., 244 S.W.2d l.c. (23) p. 1015. See also 12 Am. Jur., Contempt, Sec. 7, p. 10, 11, 12 and 13; 17 C.J.S., Contempt, Sec. 33; 43 C.J.S., Injunctions, Sec. 263, a, c.

That portion of the second specification finding that these acts were caused by these petitioners while the restraining order was in force is fully supported by the evidence. The restraining order was issued at approximately 2:00 P.M., and none of the acts which these petitioners were found to have caused occurred until after 5:00 P.M., and after these petitioners not only had been served but had knowledge of the existence of the order through information given them by the petitioner Howard at the parking lot meeting.

The evidence clearly supports the finding that the petitioners Curtis, Clay, Seay, Perkins, and Richards are guilty beyond a reasonable

doubt of criminal contempt under the 2nd and 4th specifications of the findings of fact and judgment entered as to those petitioners. The entry by the petitioner Curtis into the bank at 5:50 P.M. and his announcement therein concerning the meeting at the Wheatley "Y" at 6:00 P.M., was, in effect, a clear act of counseling, abetting and directing the demonstrators in the bank to continue their activities in violation of the restraining order for another 10 minutes. This in spite of this petitioners own admission that he understood those activities were in violation of that order. Moreover, Curtis admitted that he had control of the whole demonstration and the evidence is clear that the other demonstrators so understood and looked to him for direction and control. With respect to the petitioner Clay the evidence is that after the parking lot meeting, he stood on the sidewalk leading to the bank and directed a group of demonstrators into the bank. The petitioner Seay went into the bank and brought outside two children who were participating in the demonstration. He actively directed the demonstrators blocking the door to move back further against the door so that their unlawful activity could be made more effective. The petitioner Perkins directed the demonstrators as they sang inside the bank, he walked around in the bank with them, and he led the complaints against what he termed "police brutality" or "sheriff brutality." These are activities that clearly show his direction, control, supervision and planning was such as to cause others to violate the restraining order and to aid, abet and counsel them to do so. The activities of the petitioner Richards inside the bank as he joined the demonstrators as they sang and "milled about" is proof of his aiding, abetting, and counselling others to violate the restraining order by

engaging in such activity. His activity in directing certain of the demonstrators who had entered the bank carrying signs to take the signs outside the bank and then return goes to the same issue as it does to prove this petitioner's direction, control, supervision, and planning were such as to cause others to violate the restraining order.

The evidence does not sustain the finding that the petitioners Thompson, Howard, Marian Oldham and Charles Oldham were guilty, beyond a reasonable doubt, of any of the specifications found against them.

All of these petitioners were found guilty of the first specification in that they conspired to violate the restraining order by appearing with a crowd of more than one hundred persons and, "* * * then and there singing, chanting, parading, shouting and milling about in and around said bank premises.* * *" The general rule is that a person can be guilty of contempt for conspiring to cause or bring about a contemptuous action is stated in 17 C.J.S., Contempt, Sec. 33. This rule is recognized in Missouri. Osborne v. Purdome, Mo., 244 S.W.2d 1005 (23); Middleton v. Tozer, Mo. App., 259 S.W.2d l.c. 86. For an example of the same ruling from another jurisdiction, see Berlandi v. Commonwealth, Mass., 50 N.E.2d 210. But certainly no one could be held to be guilty, beyond a reasonable doubt, of a conspiracy because they "appeared" with a crowd of over one hundred persons. Yet that is the most the evidence shows as to these petitioners. These petitioners neither sang nor chanted, nor shouted at any place. Only Thompson can be held to have done any parading and that was done in a manner not forbidden by the restraining order. The balance of the first specification consists of findings that these petitioners conspired

to cause this crowd or part of it to do acts forbidden by the restraining order. There are only two of these findings supported by any evidence at all. First is the finding that these petitioners conspired with others to cause this crowd, or part of it, to lock arms in front of the entrances so as to bar entry to and exit from the bank. The second is that they conspired to cause the crowd or part of it to go into the bank. The evidence is clearly deficient as to these findings. This is true even if we disregard the fact that the meeting of August 29th took place prior to the issuance of the restraining order and consider the action at that meeting where it was voted to block the doors and enter the bank. The petitioner Howard was not present at that meeting, and the uncontradicted evidence is that Mr. Oldham there recommended obedience to the restraining order. There is no showing that he later voted for the resolution to block the doors or in any way changed his recommendation nor acted in any manner to show his joining any conspiracy. The petitioners Thompson and Mrs. Oldham were present at the meeting of the 29th, but there was no evidence as to how they voted on the resolution. It is urged that attendance at the parking lot meeting and holding up their hands in response to Curtis' inquiry as to who would be willing to block the doors constitutes proof of these findings. However, there is no evidence that the matter forming the basis of the second finding, entering the bank, was discussed at the parking lot meeting. Charles Oldham was not present at the parking lot meeting. The petitioner Howard did not raise his hand, and the evidence is that he spoke earnestly against violating the restraining order. The only proof of these findings

is as to the petitioners Thompson and Marian Oldham. This consists of proof they were present at the parking lot meeting and held up their hands. Such activity falls short of proving, beyond a reasonable doubt, these petitioners conspired to cause others to violate the restraining order.

The petitioner Thompson is the only one of these four petitioners to have been found guilty of the second specification. There is no evidence to sustain such a finding. The evidence as to the petitioner Thompson is that he was a captain and in charge of a picket line. There is no showing that those in the picket line violated the restraining order under Thompson's control, direction, supervision, and planning.

Each of these four petitioners were found to be guilty of the third specification. This specification alleges that, while the restraining order was in force, and having the right to direct, control, supervise and plan the activities of the St. Louis Committee of Racial Equality and its members, and knowing some of the members of that organization were violating the restraining order, these four petitioners failed "* * * to so direct, control, and supervise said activities as to cause said violation to cease and desist." We have grave doubts whether this specification complies with the clearly stated requirements of Sec. 476.140, supra., and of Rule 35.01, supra., stated earlier herein. See Glenn v. Hendrix, supra, where it was held that the essential facts and circumstances constituting the offense and not the legal conclusions of the court must be recited in the judgment. We need not and do not rule the point, however, for even if we were

to hold this specification obeys the statute and rule, there is no proof to substantiate such a finding.

Since none of these petitioners were found to have been guilty of the fourth specification, we need not discuss it. It follows that the petitioners Thompson, Howard, Marian Oldham, and Charles Oldham are illegally restrained and should be discharged forthwith.

The petitioners complain of the appointment of Wayne L. Millsap and John Montrey, plaintiffs' attorneys, as special prosecutors in the contempt proceedings. It is alleged that by said appointments petitioners were deprived of their rights to due process and equal protection of the laws as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, the Constitution of the State of Missouri, Art. 1, Sec. 10 and the statutes of the State of Missouri, particularly Sec. 56.110, RSMO. 1959. In support of this allegation these petitioners contend that the aforementioned Wayne L. Millsap had a personal, pecuniary, special and inconsistent interest in the outcome of the matter, and, therefore, petitioners were deprived of a fair and impartial trial; that Wayne L. Millsap's dual role in the case was inconsistent in that he served as attorney for the plaintiff, filed the petition for injunctive relief, secured the restraining order for the sole benefit of the bank, filed the application for citation for contempt seeking court costs, expenses and attorneys' fees, and that he was the son-in-law of Dillon Ross, President of Jefferson Bank and Trust Company. It was further alleged that said Wayne L. Millsap attempted to intimidate and coerce a sixteen

year old witness, a member of the class sought to be prosecuted and promised her immunity, thus depriving petitioners of their constitutional rights to a fair and impartial trial, due process and equal protection of the laws under the Constitution of the United States. The answer of petitioners in cause No. 31,779 contained like averments with the exception of the last two above mentioned allegations.

At the hearing there was no evidence to support this last above mentioned charge or evidence of the relationship between Millsap and Dillon Ross, President of Jefferson Bank and Trust Company. All that appears from the record is that Wayne L. Millsap appeared throughout the proceedings before Judge Scott as the attorney for the bank, which also employed John Montrey. There was no evidence whatever of improper conduct on the part of either Mr. Millsap or Mr. Montrey. Both are respected members of the Bar of this State, and by reason thereof officers of the court bound to represent the court when called upon to do so. Under such appointment they are considered as representing the State and not their private clients.

Under the New Jersey law it is expressly provided that in a criminal contempt case, the court may, in its discretion, appoint the attorney who represents the complaining party, unless it senses that unfairness may ensue. Department of Health v. Roselle, 34 N. J. 331, 169 A. 2d 153; Whippany Paperboard Co., Inc. v. Local No. 301 United Paperworkers of America, C.I.O., et al., 93 A. 2d 349. And in McCann v. New York Stock Exchange et al. (C.C.2d Cir.) Judge Learned Hand has this to say on the subject:

> "* * *the Court may proceed sua sponte without assistance of any attorney, as in the case of disorder in the courtroom; there can be little

> doubt about the kind of proceeding when this is done. But the judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should; * * *."

In Osborne v. Purdome, Mo., 250 S.W.2d l.c. (1,2) p. 160, this point was ruled. The court thus stated:

> "In State ex rel. Gentry v. Becker, 351 Mo. 769, 174 S.W.2d 181, 184, we held that a court could make such an appointment, saying: 'The court has the inherent power to punish for contempt and if it has also the inherent power to appoint or request a lawyer, as an officer of the court, to represent it or the state in the prosecution of the contempt proceeding, that is all the power the court reasonably needs for its own protection and for the due administration of justice.' * * *"

In the case at bar there are no allegations of fact in Respondents' answers to the return tending to show that the trial court abused its discretion in the appointment of Mr. Millsap and Mr. Montrey as special prosecutors, or that their constitutional rights were denied thereby, nor was there any evidence introduced at the hearing which tended to show any impropriety in the appointments. Sec. 56.110 RSMo 1959 is not applicable. That section of the statutes relates to criminal proceedings and provides that the court may appoint an attorney to replace the prosecuting attorney or his assistant where either is interested in the case being prosecuted or defended by reason of having been employed as counsel and such employment is inconsistent with the duties of his office, or where either shall be related to the defendant. The point urged has no merit.

These nine petitioners next contend the restraining order was void for two reasons. First, because the order served was not the order received by the sheriff and certified by the clerk. The second contention

is that the restraining order served failed to recite approval of the bond. The petitioners have failed to cite any authority for either contention nor do they, in their brief, refer to any facts to support these contentions. An examination of the record shows that the restraining orders served were copies of and identical to the order entered by the court. In their joint answer petitioners state, "There are two alleged restraining orders in the Court's file." and incorporate by reference exhibits P3 and P4 which are the "Petition for Injunction" and the "Restraining Order." Their contentions with regard to the failure of the restraining order to recite the approval of the bond evidently arises from their confusion in regarding both of these documents as restraining orders. The "Restraining Order" issued on August 30th contains the following:

> "Thereupon, comes the plaintiff by attorney, and presents to the Court its Injunction bond, conditioned accourding (sic) to law in the penal sum of Ten Thousand Dollars ($10,000.00), with Hanover Insurance Company as surety, and the Court having seen and examined the same, doth order that said bond be approved and filed, which is now accordingly done."

In their brief the petitioners seek to enlarge upon the matters contained in their answer and raise the contention that the restraining order is void because its provisions are "* * * vague, too broad, too indefinite and are unenforceable." As has been held herein, the issues are circumscribed by the return and the answer thereto. However, a reading of the restraining order will illustrate the fallacy of such an argument. That order is very definite in its terms, clearly proscribes certain specified acts and activities and is sufficient to give notice to anyone reading it what acts are forbidden. There is no merit to petitioners' contention the restraining order is void.

Petitioners in their returns attack the validity of the restraining order on the grounds that the indemnity bond was void in the following respects: (1) because it failed to indemnify all parties named in the restraining order, (2) because (as to the Howard in 31,777, all seven petitioners in 31,778 and the three petitioners in 31,779), the petitioners were not named in the bond nor did the bond name a class to which they belonged, (3) the bond was not approved or signed by the judge, and (4) alterations were made on its face which rendered it ambiguous. These contentions will be considered in turn.

In the absence of any elaboration in petitioners' law memorandum it is difficult to understand the basis for the first contention. In its petition for an injunction the bank named as defendants Curtis, Clay, Charles Oldham, Marian Oldham, Richards, Cahill, Daly, Hays, Perkins, Seay, Thompson, and West, individually and as members of a class known as St. Louis Committee of Racial Equality. Cahill was immediately dismissed as a defendant with the result his name does not appear in the caption of the certified copy of the record regarding the granting of the restraining order, and it was crossed out in one place in the bond. The court's record named as defendants Curtis, Clay, Charles Oldham, Marian Oldham, Richards, Daly, Hays, Perkins, Seay, Thompson, and West. In the first paragraph of the bond the bank as principal, and Hanover Insurance Company as surety, bound itself to all of the original defendants, including Cahill. In the second paragraph all of the original defendants were named, but Cahill's name is crossed out. Since Cahill was not named in the restraining order, the inclusion of his name in the first

paragraph of the bond is an obvious oversight, and should be regarded as a superfluity. Barrett v. Stoddard County, Mo. App., 183 S.W. 644; Rubelman Hardware Co. v. Greve, 18 Mo. App. 6. There is no merit to this contention.

The next contention is that the bond is void because the seven petitioners named in 31,778 and the three petitioners named in 31,779, were not named in the bond, nor was a class to which they belonged named. The execution of a bond as a prerequisite to the obtaining of a restraining order is governed by Civil Rule 92.09, which reads:

> "No injunction or restraining order, unless on final hearing or judgment, shall issue in any case, except in suits instituted by the state in its own behalf, until the plaintiff, or some responsible person for him, shall have executed a bond with sufficient surety or sureties to the other party, in such sum as the court or judge shall deem sufficient to secure the amount or other matter to be enjoined, and all damages that may be occasioned by such injunction or restraining order to the parties enjoined, or to any party interested in the subject matter of the controversy, conditioned that the plaintiff will abide by the decision which shall be made thereon, and pay all sums of money, damages and costs that shall be adjudged against him if the injunction or restraining order shall be dissolved."

This rule is the same as Section 526.070, RSMo 1949, V.A.M.S., except that restraining orders are expressly included.

Preliminarily, it may be stated that the requirement that a bond be posted before a restraining order or temporary injunction is issued is jurisdictional, and one issued without a bond is void. State ex rel Becker v. Westhues, Mo., 286 S.W. 882; Gounis, Ex parte, 304 Mo. 428, 263 S.W. 988.

The first part of petitioners' contention may be readily disposed of. These petitioners were charged with violating the restraining order some time after it had been issued. Obviously the bank

could not be expected to know, and to name in its petition at the time it was filed, the names of all those who might subsequently violate the restraining order. The power of clairvoyance is not common, if it exists at all.

The second part presents a more difficult problem. The defendants named in the bank's petition were sued as individuals and "as representatives of a class known as St. Louis Committee of Racial Equality." The caption of the restraining order similarly named them in their individual and in their representative capacity. However, in the bond, both in the first and second paragraphs, they are referred to only as individuals. Petitioner Howard in the first case, and all of the petitioners in the second and third cases, claim that the bond is void because (A) the named defendants were not described therein as the representatives of the class; and (B) because the bond did not indemnify "any party interested in the subject matter of the controversy," the phrase used in Civil Rule 92.09.

It is true that in the body of the bond the named defendants were not described as the representatives of the class. But the caption referred to them as "Curtis, et al, etc." This is a common and ordinary way of referring to the caption of the petition, and that, of course, described the named defendants as the representatives of the class. Furthermore, in the second paragraph of the bond it is recited that a temporary injunction had been issued against the named defendants "as by the record of said Court will fully appear." The court's record (the petition, and the order granting the restraining order) all make it clear that the named defendants were sued both as individuals and as representatives of the class.

In Franz v. Buder, 34 F. 2d 353, 355, the Circuit Court of Appeals for the Eighth Circuit said that, "considerable liberality is exercised in construing designations of obligees in bonds, so long as the intent of the parties is clear." This court, in Stine v. Southwest Bank of St. Louis, Mo. App., 108 S.W. 2d 633, held that the omission to properly designate a person as obligee on a bond would not render the bond void where the identity of the individual could be gathered from the whole instrument. In fact, a close reading of that case will disclose that the court went beyond the bond itself, and examined the entire record to determine the correct name of the obligee. To the same effect see General Motors Acceptance Corp. v. Hutto, 136 S.C. 207, 134 S.E. 232, where the Corporation, which held a judgment against Hutto, was permitted to recover on a bond in which it was not named as obligee, but which referred to the judgment held by the Corporation. In the light of these authorities it would seem that the failure to expressly describe the named defendants in the bond as representatives of the class was a mere "mistake or clerical error" (Stine v. Southwest Bank, supra, p. 635) which would not render the bond void.

The petitioners rely heavily on the case of Dillon, Ex parte, Mo. App., 96 S.W. 2d 1095. In that case the Springfield Court of Appeals interpreted the statute to require the bond to run not only to the parties named in the litigation, but also to persons interested in the subject matter of the action. A careful analysis of the present Rule discloses that it only requires that the bond be executed "to the other party." The reference therein to other persons interested in the subject matter is confined solely to the

determination by the court of the amount of the bond, in order that it may be sufficient to indemnify other persons, not parties, who may be interested. Thus the Rule states that the plaintiff shall execute a bond: "* * * in such sum as the court or judge shall deem sufficient to secure the amount or other matter to be enjoined, and all damages that may be occasioned by such injunction or restraining order to the parties enjoined, or to any party interested in the subject matter of the controversy."

If the interpretation of the Springfield Court of Appeals is correct, it would mean that in every case where the possibility exists that other persons might subsequently join with the named defendants in willfully violating a restraining order, it would be necessary to write into the bond a provision that it was executed in favor of any person interested in the subject matter of the controversy. It would also mean that without such a provision in the bond the transgressor, although he willfully violated the order, could not be punished by contempt. However, in Dillon, the court held that Mr. and Mrs. Dillon, though not served with a copy of the order, had actual knowledge of the order and that when they thereafter violated it, they were guilty of contempt.

This court need not rule upon this apparent conflict, for even if the Rule makes it mandatory for the plaintiff to execute the bond in favor of any interested party, as well as the named defendants, there is another rule of law which is applicable. There are innumerable cases which hold that where a bond is given in pursuance of a statute, courts in enforcing the bond will read into it the terms of the statute which have been omitted, and will read out of

it terms included which are not authorized or required by the statute. People, to Use of Wilson v. Mosley, Mo., 263 S.W. 2d 340 (a forthcoming bond given by an interpleader); State ex rel Jefferson County v. Sheible, Mo., 163 S.W. 2d 559 (a bond given by a county treasurer); State v. Vienup, 347 Mo. 382, 147 S.W. 2d 627 (a bond given by a licensee under the Liquor Control Act); State v. Wipke, 345 Mo. 283, 133 S.W. 2d 354 (same kind of bond); State v. Ruebling, Mo., 133 S.W. 2d 360 (same); Fogarty v. Davis, 305 Mo. 288, 264 S.W. 879 (contractor's bond given school board); Zellars v. National Surety Co., 210 Mo. 86, 108 S.W. 548 (appeal bond); State ex rel Sanders v. Hartford Acc. & Ind. Co., 235 Mo. App. 729, 143 S.W. 2d 483 (security dealers bond); Rubelman Hardware Co. v. Greve, 18 Mo. App. 6 (injunction bond). Hence, if it was a mandatory requirement of the statute that the bond run to interested parties, the court may read into the bond that provision of the statute.

The petitioners then contend the bond is void because it was not approved or signed by the judge. The basis for this claim of invalidity is that the court wrote "8/30/63 Approved Michael J. Scott, Judge" on the power of attorney attached to the bond, rather than on the bond itself. No cases are cited in petitioners' memorandum in support of this contention, and careful research has failed to disclose any bearing directly on the question. However, there is no merit to the point. First, because Rule 92.09 does not require that the court approve the bond. Nor does Rule 92.10, which provides only that, "* * * the bond may be entered into before said clerk, if the court or judge granting the order or injunction shall first approve the security." (Emphasis supplied.)

There is a second answer to petitioners' contention. The court's record recites that the plaintiff presented the bond to the court, and that the court approved it. It has long been the rule in this state that a court speaks only through its records, which import verity, and cannot be impeached by extraneous evidence. In re Wakefield, 365 Mo. 415, 283 S.W. 2d 467; Flansburg v. Kaiser, Mo., 184 S.W. 2d 1004. Hence the record showing the court's approval of the bond is conclusive.

The last reason whereby the petitioners contend the bond is void is that alterations were made on its face which render it ambiguous. The only alteration made in the bond was that in the second paragraph where Cahill's name was crossed out, although it was allowed to remain in the first paragraph. Petitioners do not explain in their law memorandum why this alteration would render the bond null and void, nor can we conceive of any reason why this would be so.

Where two or more obligees are named in the bond, each has a separate right to recover thereon in the event of a breach. Helmkampf v. Wood, 85 Mo. App. 227. While it is the better practice for all obligees named in the bond to join in a motion for the assessment of damages, an obligee who has not been injured or damaged need not join. Barrett v. Stoddard County, 272 Mo. 129, 197 S.W. 914. It follows that even if the bond may be said to be ambiguous as to Cahill, such ambiguity would not affect the rights of the other petitioners named therein. Since Cahill was not restrained, he could have no right to join in a motion for an assessment of damages. It is, of course, apparent that the failure to strike Cahill's name

from the first paragraph was a mere oversight, and as stated earlier, the inclusion of his name may be treated as a superfluity. The petitioners' contentions with regard to the bond are without merit.

The petitioners' contentions with regard to the attachment are summarized in their contention that they were not sufficiently informed thereby of the specific charges placed against them. They contend that this lack of sufficient information constitutes a violation of due process of law as guaranteed by the 14th Amendment of the Constitution of the United States and also as guaranteed to them by Article I, Section 10, 18(a), 19 and 21 of the Constitution of the State of Missouri. Sections 18(a) and 19 have to do with criminal proceedings and are not applicable to a proceeding for criminal contempt. Osborne v. Purdome, supra. Article I, Sec. 21, has to do with cruel and unusual punishment and will be discussed along with the other arguments advanced by petitioners with regard to their contentions that the sentences and fines imposed constitute cruel and unusual punishment. Article I, Section 10 of the Constitution of Missouri is what is generally known as the "due process law clause" of the Constitution and corresponds to the due process of law clause of the 14th Amendment of the Constitution of the United States. There is no merit to petitioners' contentions.

It is axiomatic that due process of law is not satisfied unless the party proceeded against is apprized of what is happening and is given an opportunity to defend (In Re Barger, Mo. App., 365 S.W. 2d 89). In a contempt case the alleged contemnor is entitled to a notice which fairly and fully informs him of the specific acts of

contempt with which he is charged, and this notice must be given so as to afford a reasonable time to make his defense. G. v. Souder, Mo. App., 305 S.W. 2d 883. The petitioners' contentions with regard to whether the time given them to prepare their defense was reasonable will be dealt with in connection with those petitioners whose applications are consolidated into cases 31,778 and 31,779 for the reason that there is no contention in this regard in the joint answer filed in 31,777. However, in all these cases it is alleged that the first element of due process, sufficient notice, is missing.

With reference to the petitioners whose applications were consolidated in 31,777, the application for the attachment set out in detail the activities of the petitioners which it was contended constituted willful and deliberate violations of the restraining order. These are the same charges as contained in the specifications found against these petitioners. As stated earlier herein that application prayed that the petitioners show cause why they should not be punished for said contempt. This application was granted, and an attachment order issued which called for the petitioners to be brought before the court on September 3. On the morning of that day counsel for all the petitioners were served with a copy of that application. At the request of the petitioners and to allow them to file their applications for writ of habeas corpus and prohibition in this court, the hearings were postponed until September 9th. Certain preliminary matters such as interrogatories and depositions not having been disposed of at that time the matter was passed, with consent of all parties, to September 23rd. On the 11th of September and again on the 18th of that month the petitioners were served

with notice to show cause why they should not be punished "as for criminal contempt." The notice recited the restraining order in full and charged the petitioners with willful disobedience of that order in the manner set out in the specifications. On the 23rd this notice was read to the petitioners in open court whereupon they plead not guilty and announced ready for trial.

With regard to the petitioners whose applications are consolidated into our files 31,778 and 31,779, the proceedings were begun by the filing of a motion. See Rule 92.15, V.A.M.R., Sec. 526.220, RSMo., 1959. That motion set out in great particular the specific acts by which it was contended the petitioners there involved had violated the restraining order. Those acts are the same as contained in the specifications of the judgment entered as to each of these petitioners. The petitioners were each served with a copy of the attachment order which, as to those petitioners in 31,779, contains the specific charge that they were violating the restraining order by "physically hindering or interfering with persons desiring to enter or leave Jefferson Bank and Trust Company, standing, lying and sitting in said bank and thus interfering with normal conduct of said banking business, and standing and milling inside said banking premises and hindering and interfering with access by the public to plaintiff's banking facilities." As to those petitioners in 31,778, the attachment order served contains the specific charge that they were violating the restraining order by "standing in, lying in, sitting in, singing in, or walking in* * *" the bank. The petitioners were brought before the court, and counsel appearing for the petitioners in 31,777 entered their appearance. As provided by

Rule 35.01(b), supra, the notice was given orally by the judge in open court reading the written notice to these petitioners. In each case after hearing evidence from witnesses who identified each of the petitioners and described conduct by each of them which would constitute a violation of the restraining order, the court entered an order to show cause setting out in detail the acts of the petitioner alleged to have been in violation of the restraining order, fixed a time and date for hearing, and admitted the petitioners to bail. Rule 35.01(b), supra.

In all three of the cases the petitioners have attacked the jurisdiction of the Circuit Court to issue the restraining order on the grounds that a "labor dispute" exists. Their contentions are that: (1) A labor dispute existed within the meaning and interpretations of the Federal statutes relating to labor relations; (2) By such statutes the Federal Government has preempted the field of labor relations and deprived the State courts of jurisdiction in such matters; (3) The evidence has not shown these cases to come within any of the exceptions to this rule which would permit the State court to exercise jurisdiction. These matters will be discussed in the order named.

Presumably the petitioners claim that a labor dispute arose, within the meaning of the Federal statutes, because of CORE's demand on the Jefferson Bank that it employ four Negroes as clerks or tellers, and the Bank's refusal to accede to its demand. The only Federal statute cited by the petitioners in their law memorandum is the Norris-La Guardia Act, 29 U.S.C.A. 101. Section 101 of that Act provides:

> "No court of the United States, as defined in this chapter, shall have jurisdiction to issue

any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter." (Emphasis supplied.)

The term "labor dispute" is defined in Section 113(c) as follows:

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

In New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 58 S.Ct. 703, 82 L.Ed. 1012 (1938), cited by petitioners, a corporation composed of colored persons, organized for the mutual improvement of its members and the promotion of civic, educational, benevolent, and charitable enterprises, demanded that the grocery chain employ colored persons in managerial and sales positions in a newly-opened store. Sanitary Grocery refused, the Alliance picketed the store, and upon the petition of Sanitary Grocery the District Court of the District of Columbia enjoined the picketing. Pointing to sub-paragraph (c) of Section 113, as well as to sub-paragraph (a) which defines a case involving or growing out of a labor dispute, the Supreme Court said (303 U.S. 561):

"The Act does not concern itself with the background or the motives of the dispute. The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor

organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation. There is no justification in the apparent purposes or the express terms of the Act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon differences of race or color."

Regarding the purpose of the Act, the court held (303 U.S. 562, 563):

"The legislative history of the Act demonstrates that it was the purpose of the Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that Act. It was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute concerning 'terms and conditions of employment' in an industry or a plant or a place of business should be lawful; that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices. The District Court erred in not complying with the provisions of the Act.

"The decree must be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion."

Of course, as the underlined portion of Section 101 indicates, the prohibition against the issuance of restraining orders or injunctions in a case involving or growing out of a labor dispute applies only to a "court of the United States"; and does not limit the jurisdiction of state courts. In McCarroll v. Los Angeles County Dist. Coun. of Carpenters, 49 Cal. 2d 45, 315 P. 2d 322, 332 (1957), the Supreme Court of California states:

"The Norris-LaGuardia Act is in terms drawn as a limitation on the courts of the United States.

'No court of the United States,' declares section 1, 'shall have jurisdiction to issue any * * * injunction in a case involving or growing out of a labor dispute * * *,' and a court of the United States is defined in section 13(d) as 'any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.' 29 U.S.C.A., Sec. 101, 113(d). The statute aimed to restrict the federal equity power, and was justified constitutionally on the basis of Congress' power to regulate the jurisdiction of the federal courts. Brotherhood of R.R. Trainmen v. Toledo, Peoria & Western R.R., 321 U.S. 50, 58, 63, 64 S.Ct. 413, 88 L.Ed. 534; Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330, 58 S.Ct. 578, 82 L.Ed. 872. It did not limit the remedial power of the state courts (see United Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp., D.C. E.D. Pa., 65 F. Supp. 420, 422; General Bldg. Contractors' Ass'n v. Local Unions, 370 Pa. 73, 87 A. 2d 250, 254, 32 A.L.R. 2d 822; Markham & Callow, Inc., v. International Woodworkers, 170 Or. 517, 135 P. 2d 727, 746, citing Frankfurter and Greene, The Labor Injunction at 220; 39 Ops. U.S. Atty. Gen. 242, 246), and could not constitutionally have done so since its prohibition was not restricted to injunctions in labor disputes affecting interstate commerce or any other subject over which Congress has paramount power."

Certiorari was denied, 355 U.S. 932, 78 S.Ct. 413, 2 L.Ed. 2d 415.

Furthermore, the Norris-LaGuardia Act does not prohibit even the Federal courts from issuing injunctions in <u>all</u> cases involving or growing out of a labor dispute. The jurisdiction of the Federal courts to continue to issue restraining orders and injunctions in cases where "* * * unlawful acts have been threatened and will be committed unless restrained, or have been committed and will be continued, unless restrained * * *" is recognized by Section 107 of the Act. Thus it has been held that the Norris-LaGuardia Act does not prevent a Federal court from restraining acts of violence. Brotherhood of Railroad Trainmen, Local Lodge No. 721 v. Central of Georgia Ry. Co., (4 C.A., 1956), 229 F. 2d 901; Cater Const. Co. v. Nischwitz, (7 C.A., 1940), 111 F. 2d 971; Grace Co. v. Williams, (8 C.A., 1938), 96 F. 2d 478.

While the petitioners have not referred to it in their memorandum, there is another Federal measure which merits consideration, the Labor Management Relations Act, 29 U.S.C.A. 141. In brief, that Act creates a Board and a General Counsel, Sec. 153; declares certain acts of an employer, and of a labor organization, to be unfair labor practices, Sec. 158; establishes procedures for the determination of an appropriate bargaining unit and the selection and certification of a collective bargaining representative, Sec. 159; and empowers the Board to prevent and enjoin the commission of unfair labor practices, Sec. 160. By Section 152(9) the term "labor dispute" is defined as follows:

> "(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

It will be noted that this definition of the term "labor dispute" is almost identical to that contained in the Norris-LaGuardia Act.

Other than the definition of the term "labor dispute," there is nothing in the Act which would support the claim that CORE's demand on the bank, and the latter's refusal to accede thereto, was an unfair labor practice, or otherwise constituted a violation of the Act. No case has been cited by petitioners, and none has been found, involving under the Labor Management Relations Act a factual situation similar to that in New Negro Alliance v. Sanitary Grocery, supra. However, in view of the similarity in language between the pertinent provisions of the Norris-LaGuardia Act and that of the Labor Management Relations Act, the following statement by

the Supreme Court of Pennsylvania in Navios Corporation v. National Maritime Union of America, 402 Pa. 325, 166 A. 2d 625, 630, is significant:

> "The definition of labor dispute in the National Labor Relations Act is identical with the definition of labor dispute in the Norris-LaGuardia Act, except that the latter Act does not include the word 'tenure' and uses the conjunctive phrase, 'whether or not,' instead of the more simple 'whether.' It follows, therefore, that if the facts of a case constitute a labor dispute within the meaning of the Norris-LaGuardia Act, they also constitute a labor dispute within the meaning of the National Labor Relations Act. * * *"

Certiorari was denied, 366 U.S. 905, 81 S.Ct. 1047, 6 L.Ed. 2d 204, and rehearing denied, 366 U.S. 941, 81 S.Ct. 1658, 6 L.Ed. 2d 852.

Petitioners then contend that the Federal Government has "preempted the field of labor disputes and thereby greatly limited the injunctive power of the State courts in area of labor disputes". If by "labor dispute" the petitioners mean an unfair labor practice, or a matter concerning the appropriate bargaining unit or the proper representative, as defined in the Labor Management Relations Act, petitioners' contention may be conceded. In Graybar Electric Co. v. Automotive, P. & A. I. Emp. Union, Local 618, 365 Mo. 753, 287 S.W. 2d 794, decided in 1956, the Supreme Court en Banc reviewed the Federal decisions, Garner v. Teamsters, C. & H. Loc. Un. 776, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228; Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546, which excluded State courts from assuming jurisdiction of labor controversies that came within the ambit of the Labor Management Relations Act. In that case the employer sought to enjoin peaceful picketing on the grounds that it was for the unlawful purpose of forcing the employer to coerce

his employees into joining the Union, in violation of Section 29, Article I of our Constitution. The Union pleaded that if the employer's allegation was true, it constituted an unfair labor practice, and that the Labor Board therefore had exclusive jurisdiction of the case. Our Supreme Court concurred with this argument. In the later case of Swope v. Emerson Elec. Mfg. Co., Mo. 1957, 303 S.W. 2d 35, cert. den. 355 U.S. 894, 78 S.Ct. 268, 2 L.Ed. 2d 192, fifteen former employees sued the employer for damages claiming that they had been discharged because of their union activities. The employer raised the defense that the allegation, if true, constituted an unfair labor practice, and that the Labor Board had exclusive jurisdiction. The Supreme Court agreed that the trial court had had no jurisdiction, and reversed judgments in favor of the former employees. For other cases holding that our State courts have no jurisdiction where an unfair labor practice is involved see Wolff v. Owsley, Mo. App., 332 S.W. 2d 462; United Brick & Tile Division of American-Marietta Co. v. Wilkinson, Mo. App., 325 S.W. 2d 50; Swift & Co. v. Doe, Mo. App., 315 S.W. 2d 465, cert. den. 79 S.Ct. 587, 359 U.S. 911, 3 L.Ed. 2d 574, cert. den. 79 S.Ct. 589, 359 U.S. 915, 3 L.Ed. 2d 577; McAmis v. Panhandle-Eastern Pipe Line Co., Mo. App., 273 S.W. 2d 789.

It should be pointed out, in passing, that not every matter involving a labor organization or a matter of labor relations is necessarily an unfair labor practice or even a labor dispute of which the Board has exclusive jurisdiction. For example, see Adams Dairy, Inc. v. Burke, Mo. 1956, 293 S.W. 2d 281, cert. den. 352 U.S. 969, 77 S.Ct. 360, 1 L.Ed. 2d 323, where the purpose of the Union's

informational campaign and boycott was enjoined as a concerted illegal activity because its sole objective was to injure the Company's business. It is also of interest to note that by Chapter 296, V.A.M.S. (Laws 1961, p. 439) the General Assembly has declared it to be an unlawful employment practice to discriminate against any individual because of race, creed, color, religion, national origin, or ancestry; and has provided for the enforcement of its orders to cease and desist from any such discriminatory practice. In the light of this declared public policy, and in view of the decision of the Supreme Court of the United States in Hughes v. Superior Court of California for Contra Costa County, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985, it is at least doubtful whether the petitioners' demands for the employment of four Negroes, solely because of their race, may be considered a labor dispute. In that case, by repeated decisions, the Supreme Court of California had declared that discrimination in employment on the basis of color was against the public policy of that State. A group calling themselves Progressive Citizens of America demanded of Lucky Stores, Inc., that it hire Negroes at its grocery store, as white clerks quit or were transferred, until the proportion of Negro clerks to white clerks approximated the proportion of Negro to white customers, about 50%. Upon Lucky's refusal of the demand the store was picketed. Lucky obtained a temporary injunction against the picketing, the Supreme Court of California upheld it, and the Supreme Court of the United States granted certiorari.

Neither the Norris-LaGuardia Act nor the Labor Management Relations Act was mentioned in the Supreme Court's opinion, nor

was the New Negro Alliance case, supra, cited. The question presented, in the court's words, was, "Does the Fourteenth Amendment of the Constitution bar a state from use of the injunction to prohibit picketing of a place of business solely in order to secure compliance with a demand that its employees be in proportion to the racial origin of its then customers? * * *" (339 U.S. 461). Holding that it does not, the Supreme Court said (l.c. 466):

> "* * * We cannot construe the Due Process Clause as precluding California from securing respect for its policy against involuntary employment on racial lines by prohibiting systematic picketing that would subvert such policy.* * *"

In any event, the irrefutable answer to petitioner's argument is that while the jurisdiction of state courts has been restricted by the Labor Management Relations Act, their right to enjoin violence and breaches of the peace has not been eliminated, which is all that was restrained in the instant case. This was recognized in Garner v. Teamsters Union, supra, where the Supreme Court of the United States said (346 U.S. 488):

> "The national Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible.
>
> "This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. International Union v. Wisconsin Board, 336 U.S. 245, 254. Nor is this a case of mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise 'its historic powers over such traditionally local matters as public safety and order and the use of streets and highways.' Allen-Bradley Local v. Wisconsin Board, 315 U.S. 740, 749. * * *"

Our Supreme Court recognized this principle in Graybar Elec. Co. v. Automotive, P. & A.I. Emp. Un., supra, and in Swope v. Emerson Elec. Mfg. Co., supra. See also Angle v. Owsley, Mo. App., 332 S.W.2d 457.

There was sufficient evidence before the trial court upon which to issue the restraining order. Civil Rule 92, V.A.M.R., governs the issuance of restraining orders and injunctions. Rule 92.01 requires that a petition be filed, and, when the order or injunction is granted in vacation, it shall be signed by the judge or magistrate and returned together with the bond to the office of the clerk. Rule 92.02 provides:

> "When it shall appear by the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act of the defendant, the commission or continuance of which, during the litigation, would produce injury to the plaintiff, or when during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, some act in relation to the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction or restraining order may be granted to restrain such act."

In this case, apparently, the restraining order was issued based on the bank's petition, verified by an affidavit, that these petitioners had threatened to physically hinder and interfere with the carrying on by the bank of its business, and that of its customers with it. As already indicated, violence, intimidation and similar acts may be restrained and enjoined even though they are threatened or committed in connection with a labor dispute. In that connection see also State ex rel Allai v. Thatch, 361 Mo. 190, 234 S.W.2d 1 and Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 32 S.W. 1106. Procedurally, the issuance of a restraining order on the strength of a verified petition and a bond received the court's approval in State ex rel Allai v. Thatch, supra.

The last matter common to the answers filed by the petitioners in all three cases is that the fines and sentences imposed by the circuit court are such as to be held within the prohibition in the Constitution of the United States and the Constitution of Missouri forbidding cruel and unusual punishment.

Whether a punishment is cruel and unusual or inhuman is not an abstract question nor one to be decided upon precedent but is properly decided upon the facts of each case. Robinson v. California, 370 U.S. 660 (1962). In this case it is apparent from a consideration of the sentences that there has been no discrimination by virtue of race, color or creed in the punishment fixed by the circuit court. The activities of the petitioners found herein to constitute contempt go far beyond those areas of freedom of speech and peaceful assembly protected by the Constitution of the United States and of Missouri. It has been held that the First Amendment does not confer the right to persuade others to violate the law. Kasper v. Brittain, 245 F. 2d 92. So far as we are aware neither does any other provision of either constitution, nor does any provision of any document that embodies the governmental principles of a people who live by the rule of law. It should also be noted that we are not here dealing with uninformed, uneducated citizens unable to fully comprehend their nature and consequences of their acts. Of the nine petitioners whose applications are contained in 31,777, three are members of the bar, several are school teachers, one a minister, and one is an alderman of the City of St. Louis. Many of the remaining petitioners are students at the college level. The education level as well as the social and economic standing of these petitioners illustrates the deliberate, willful and contemptuous nature of their acts.

The petitioners' would have this court reduce the amount of the fine and/or sentence in this habeas corpus proceeding. Ex parte Page, 49 Mo. 291, ruled this matter in 1872, and the same rule applies today. Petitioners have failed to cite any case to the contrary nor are we aware of any. Such an action would do violence to the historic purpose of writs of habeas corpus. We hold we have no authority, in a habeas corpus proceeding, to reduce the fines or sentences imposed, neither have we any authority to order the circuit court to do so. For the rule in other jurisdictions see 39 C.J.S., Habeas Corpus, Sec. 121.

As held herein these petitioners were found guilty of criminal contempt, and in such cases the punishment is punitive to vindicate the authority of the court and to uphold the majesty of the law. Sec. 476.120, RSMo 1959, V.A.M.S., provides that punishment for contempt may be by fine or imprisonment or both in the discretion of the court. Earlier statutes from which this section is derived limited imprisonment for contempt to a $50.00 fine, or 10 days in jail, or both. See Laws of Missouri, 1919, p. 271; see also the dissent of Lamm, J., in Chicago, B & Q. Ry. Co. v. Gildersleeve, Mo., 118 S.W. 86, which dissent finally became the law in Ex parte Creasy, supra. The only purpose the legislature could have had in removing these limits was to evidence their intent to leave to the courts the matter of punishment suitable to the severity of the offense involved in each case.

See 476.110, RSMo 1959, V.A.M.S., is essentially the same as that found in 18 U.S.C.A., Sec. 401 (3). Under the Federal practice imprisonments for terms of from 1 to 4 years have been upheld upon

convictions for contempt as being neither abuses of discretion nor cruel and unusual punishment within the meaning of the Eighth Amendment which in substance is the same as Art. I, Sec. 21, Constitution of Missouri. Brown v. U.S., 359 U.S. 41; U.S. v. Thompson, 214 F. 2d 545. U.S. v. Hall, 198 F. 2d 726. With respect to the extent of the fine imposed, in United States v. United Mine Workers of America, 330 U.S., 258 at 303, it was held:

> "* * * In imposing a fine for criminal contempt, the trial judge may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge."
> (Emphasis supplied.)

In Osborne v. Purdome, supra, the sentence was for 10 months and the fine assessed was fixed at $1,000.00. We hold that the fines and sentences imposed upon these petitioners are not in violation of the provisions of the Constitution of the United States and of the State of Missouri prohibiting cruel and unusual punishment.

We pass now to a consideration of the proceedings with regard to the petitioners whose applications for our writ we have consolidated in file 31,778 and whose alleged contempt occurred next in point of time. What had taken place to cause the motion for attachment to be filed is perhaps best stated in the following excerpt from the petitioners' brief: "On Friday, October 4, 1963 the petitioners herein went to the Jefferson Bank and Trust Company and entered said bank carrying signs pinned or fastened to them reading '4 JOBS'. Inside the bank they sang freedom songs, locked arms, sat and stood in front of the entrances of said bank. While petitioners were inside said

bank, an official of the bank read to them a copy of the restraining order dated August 30, 1963. The petitioners had not prior to that time been served with a copy of the restraining order. After said order was read by the official of the bank, a request was made to petitioners to leave the bank. The petitioners refused to leave the bank. There were on hand police officials who promptly arrested petitioners and placed them in custody, removed them bodily from the bank to the police headquarters. They were all charged with peace disturbances and with trespassing. The arrests and placing petitioners in custody took place between 4:00 p.m. and 6:00 p.m. on Friday, October 4, 1963."

These proceedings were begun on October 4, 1963 by the filing of a pleading styled "Motion for Issuance of Attachment for Contempt Pursuant to Rule 92.15 and Section 526.220 Revised Statutes of Missouri 1959." This motion was filed in the same action and under the same heading as the original proceeding for the restraining order and injunction. By that motion the bank moved for the issuance of an attachment of the bodies of the petitioners Goins, Lee, Glenn, Jones, Ford, Grand, Roberta Tournour "* * * and other person or persons unknown for the violation of the temporary restraining order issued by this Court on August 30, 1963 (which is now in full force and effect) by physically hindering and preventing customers of the plaintiff and other members of the public from customary access to tellers' windows by locking arms in front of the doors of plaintiff's place of business, or sitting in, lying in, standing in or singing in plaintiff's place of business and thereby interfering with plaintiff's business or by harrassing (sic) plaintiff's employees or

customers in front of, around or in plaintiff's place of business." Proof of service of the attachment order on each of these petitioners was filed on October 4th.

Upon their arrest, the petitioners were taken forthwith before the Judge of Division No. 2 of the Circuit Court. After the petitioners were brought into the courtroom, Mrs. Wilson, Mrs. Younge, and Messrs. Cahill, Wilson and Ratermann entered their appearances for all the petitioners. The transcript shows that in open court the trial judge read the motion for attachment, the temporary restraining order and the order of attachment to the petitioners. Evidence was presented by 3 witnesses that these 7 petitioners were inside the bank, blocking the exits and doing other things in violation of the restraining order; that the restraining order was read to them by an officer of the bank; and that these 7 petitioners refused to leave but continued their acts of violation of the restraining order. Counsel for the petitioners offered no testimony, although participating in cross-examination of these witnesses. The court then entered its order setting bond for five of these petitioners in the amount of $1,500.00 each and for 2 of them in the amount of $5,000.00. It further ordered "* * * that said alleged contemptors (sic) be and appear in this Court and in Division Number 2 thereof on Monday, October 7th, 1963 at 10 o'clock A.M., and there and then to show cause, if any, why they should not be punished for contempt of Court in violation of the Court's restraining order heretofore issued the 30th day of August, 1963."

At the proceedings on October 7th, the petitioners were represented by the same counsel who appeared for the petitioners whose applications are consolidated in 31,777. Counsel for petitioners

requested a continuance of 3 weeks. The trial court denied the motion for a continuance, and the petitioners requested time to apply to this court for a writ of prohibition. This was granted, the writ filed, and upon its denial and counsel's return to the circuit courtroom, the court asked, "Are you ready, gentlemen?" The transcript discloses that Mr. Wilson, counsel for petitioners, stated, "We are ready, Your Honor."

Trial then proceeded over a period of several days, concluding on the 11th of October. Nineteen witnesses were called by the plaintiff and each of the petitioners testified in his or her behalf. Guardians ad Litem were appointed for the petitioners Glenn, Lee, and Tournour upon the discovery that they were minors. At the close of the evidence against petitioners, their counsel moved for a directed verdict or an "acquittal." This motion was renewed at the close of all the evidence, and was overruled by the court.

On October 25, 1963, the court entered its findings of fact and judgment as to each of these petitioners which are all very similar. The court recited the proceedings of October 4th as herein stated, found that each petitioner was present at the trial, represented by counsel, and had presented evidence in his or her behalf. The restraining order is then set out in full. The court also found that each of these petitioners had actual knowledge of the temporary restraining order by reason of having it read to them on October 4th. The petitioners were each found to have willfully disobeyed and violated that restraining order by:

> "(1) Entering the banking premises of Jefferson Bank and Trust Company and standing, sitting, and lying in front of the entrance to said bank, thereby physically hindering, obstructing, interfering with and harassing persons desiring to enter said bank's premises for the purpose of conducting their business.

"(2) Congregated and loitered individually and in a group inside said bank, thereby interfering with, hindering and annoying persons in the conduct of their business with said bank.

"(3) While inside said bank, and acting as aforesaid, and after said Restraining Order was read to him, the defendant, having been requested to leave said bank, refused to do so, thereby interfering with the proper and normal conduct of the business of Jefferson Bank and Trust Company.

"It is further found, adjudged and decreed that the aforesaid acts and conduct constitute offenses against the majesty of the law and the dignity and authority of this Court.

"It is further found, adjudged and decreed that defendant LOUIS FORD is guilty of willful disobedience of said Temporary Restraining Order, and is punishable as for criminal contempt."

Each of the petitioners received a fine of $500.00 and jail sentences as follows: Goins, 90 days; Lee and Glenn, 60 days; Jones and Ford, one year; Grand, 180 days; and Mrs. Tournour, 120 days. Each was also to pay one-seventh of the costs.

The recitals of the judgment entered as to each of the seven petitioners whose applications are consolidated into 31,778 are such that the facts need only briefly be referred to. This is for the reason that each of these petitioners, then having notice of the restraining order, were found to have: (1) entered the bank and to have stood, sat or lain in front of the entrance to the bank thereby physically hindering, obstructing and interfering with persons desiring to enter the bank to conduct business therein; (2) to have congregated and loitered inside the bank and thereby to have interfered with, hindered and annoyed persons conducting business with the bank; and (3) to have refused to leave the bank after the restraining order was read to them and upon being requested to do so thereby

interfering with the proper and normal conduct of the business of the bank. It is obvious that these acts, if found to have been committed, constituted violations of paragraphs (a), (b), and (c) of the restraining order as that order is set out earlier herein.

In that portion of their brief recited earlier in this opinion the petitioners admitted they went into the bank; that while they were inside, they sang, locked arms, sat and/or stood in front of the entrance to the bank; that "While petitioners were inside the bank an official of the bank read to them a copy of the restraining order dated August 30, 1963; that after this order was read to them they were requested to leave the bank; and that "The petitioners refused to leave the bank." We need not rule whether these admissions in the brief are sufficient, for they constitute uncontroverted facts. The petitioner Ford testified he went into the bank and stood and sat in front of the doors. He also identified himself in one of the exhibits which shows that petitioner linking arms with others and effectively blocking a doorway. Perhaps his testimony can best be summed up by this excerpt: "Q. Which doors did you stand in front of the bank that day, sir? A. I tried to stand in front of all of them. Q. Which doors did you sit in front of? A. The front door. Q. Which doors did you lie down in front of? A. I tried to lie down in front of all of them." There was evidence that his attempts to block all the entrances were successful. He also identified the petitioner Jones in an exhibit which shows that petitioner blocking an entrance to the bank. Jones testified: "A. Well, I sat in front of the door, stood in front of the door and I sang. * * * Q. And which one of the doors

did you sit at, stand at and sing at? A. I sat in the front door on the Washington side, I stood at the door, at the entrance to the savings and loan and I stood in front of the service entrance door." This petitioner also admitted the correctness of Ford's identification of him in the exhibit showing him blocking one of the entrances and, in turn, identified Ford in the exhibit showing that petitioner blocking one of the entrances. Both Jones and Ford admitted they had to be carried out of the bank. The petitioner Tournour admitted she both stood and sat in front of entrances to the bank and identified herself in an exhibit showing her locked arm in arm with others later identified as the petitioners Goins, Lee, Glenn and Grand and blocking an entrance to the bank. She also had to be carried from the bank. The petitioner Glenn testified as follows: "Q. What did you do now after you got there? A. I went inside the bank, sir. Q. You went inside the bank? A. Yes, sir. Q. What did you do inside the bank? A. I demonstrated by singing, sitting and standing. Q. And where did you stand in the bank? A. At the south door. Q. At the south door. Is that the only door at which you stood? A. Yes, sir. Q. Where did you sit in the bank? A. At the north and south door. Q. You sat at the north and the south doors? A. Yes, sir. Q. And you stood at the south door; is that right? A. Yes, sir." This petitioner also identified himself in another photograph showing him blocking an entrance to the bank. The petitioner Lee admitted that he sat and stood in entrances to the bank and that he sang while in the bank stating that he did so with the purpose of "* * * using my person to make it inconvenient for people to enter the bank." The petitioner Ian Grand

admitted he went inside the bank and joined a line of people blocking an entrance. The petitioner Goins identified himself in a line blocking the door in an exhibit showing himself, Mrs. Tournour, Glenn, Lee, and Grand blocking an entrance. This petitioner testified he went into the bank to close an account he had there but rebuttal evidence and exhibits proved that no balance had been in this account since September 25th. The witnesses Norton, Eitzman and Matteson identified the petitioners as shown in the various exhibits and testified they saw them in the various poses before the entrances as portrayed by the exhibits. The witness Matteson also identified the petitioner Ford lying in front of one of the entrances as shown in a photograph admitted into evidence. The effect of the testimony of these witnesses was that they heard Mr. McConnell read the injunction to the petitioners and heard him ask the petitioners to leave the bank. The sound movies admitted into evidence proves the reading of the injunction and the request that the petitioners leave the bank. The witnesses Steck, Mrs. Hendrickson, Smith, Mayo, Mrs. Lay, Elrod, and Dorris Esparcia each testified that they attempted to get in or out of the bank on October 4th in order to transact business and either could not or did so at great personal inconvenience and some physical danger. The witness Esparcia had to crawl between the legs of two of the demonstrators to get out of the bank. The witness Mayo had to force his way in and then force his way back out. Other witnesses had to step over the demonstrators to get in or out of the bank. Mr. Ross, president of the bank, testified that he saw some people known to him to be customers of the bank outside the bank and unable to get in.

This evidence sustains the finding these petitioners had actual notice of the restraining order. The evidence also sustains the finding that these petitioners were guilty beyond a reasonable doubt of violations of paragraphs (a), (b), and (c) of the restraining order as found in the specifications set forth in the judgment entered as to each petitioner.

These petitioners also contend that they were denied counsel while in custody, that the bail fixed by the court was excessive, and that they were afforded an inadequate time to prepare their defense.

The contention that these petitioners were denied the opportunity to consult with counsel is without merit. It is unsupported by the allegation of any factual matters which might go to prove its veracity. Moreover, no such facts appear in the transcript. What does appear plainly in the transcript is that five counsel who represented petitioners were present in the courtroom when they were brought before the court. The petitioners were represented by these members of the bar in the proceedings that then took place from the very inception of those proceedings. In view of the admissions of guilt made by each of these petitioners, it is difficult to ascertain how this contention, assuming it to be true, could prejudice the petitioners.

The court heard testimony which strongly indicated that these petitioners had willfully and deliberately violated the restraining order. It issued an order to show cause why the petitioners should not be punished as for criminal contempt and, in accordance with Rules 35.01 and 92.15, supra, fixed the bail of 5 of the petitioners at $1,500.00 each and 2 of them at $5,000.00. It requires no

citation to substantiate that the amount of bail is discretionary with the court. It should be remembered that these petitioners were alleged to have violated this injunction immediately after completion of two weeks of trial on the violations by those petitioners whose applications are consolidated into 31,777. This trial had been widely publicized. In view of the alleged violation of these petitioners immediately following that matter the trial court cannot be held to have abused its discretion in ordering bail to be fixed at $1,500.00. With respect to the two petitioners, Mr. Ford and Mr. Jones, whose bail was fixed at $5,000.00 each, the evidence is that Jones was a nonresident and Ford had testified in the trial which the judge had just concluded that he had violated the injunction on that occasion also. There is no merit to this contention.

The petitioners then contend that they were denied an adequate time to prepare their defense in violation of the due process clause of the Fourteenth Amendment. As stated earlier herein when dealing with the petitioners' contentions with regard to a lack of due process as to the attachment proceedings, an alleged contemnor is entitled to a notice which fairly and fully informs him with what he is charged and given him so as to afford a reasonable time to prepare his defense. G. v. Souder, supra. In the instant case counsel for the petitioners announced ready for trial after his application for a writ of prohibition was denied. The petitioners have failed to allege in their answers or state in their brief any facts that would lead to any reasonable conclusion that they

were in fact prejudiced by going to trial on October 7th. As stated earlier herein each of the petitioners took the stand and in fact admitted his or her guilt. There was no real controversy as to what had occurred. Under such circumstances there is no merit to the contention they were denied due process of law in that they were deprived of an adequate time to prepare their defense.

These seven petitioners raise a contention with regard to the restraining order being void which is not contained in either of the answers filed in 31,777 or 31,779. They contend the restraining order was void as to them because there was no service of that order upon them. The general rule is that if a defendant has knowledge of the issuance of an injunction or restraining order, he will be bound thereby as though it had actually been served. 43 C.J.S., Injunctions, Sec. 208. Angel Sheet Metal Equipment, Inc., v. Shewman, Mo. App., 307 S.W. 2d 694, and cases cited therein at l.c. [2], p. 696. In the instant case there can be no question but what the petitioners had knowledge of the temporary restraining order and of its specific provisions. A copy of that order was read to them by Mr. McConnell, while they were in the bank. The moving pictures introduced into evidence so show and numerous witnesses so testified that they observed and heard McConnell read the restraining order. Certainly, the petitioner Ford had excellent knowledge of that order, fcr he had been a witness in case 31,777. There is no merit to this contention.

The evidence as to the petitioners Michela Grand, Pollack and Peake can best be understood if one keeps in mind the general situation shown to have existed at the bank on October 7, 1963. As stated earlier herein, the bank had made certain additional preparations in advance of the demonstration occurring on that day. An officer of the bank was stationed at each entrance to the bank along with a bank guard. The doors were to be opened only to persons recognized as customers of the bank or to those who stated they had business with the bank or wished to become customers. It appears that one method the demonstrators had used in the previous demonstrations was to line up before the tellers' cages and change coins and bills into coins of smaller denomination. The bank had designated one teller's cage, No. 10, as a change window and had put up a sign so signifying. In addition, the signs stated that a charge of 25¢ was to be made for each transaction to those not customers of the bank. Large printed signs had been posted on every door opening into the bank, in the lobby, and at four positions outside the bank. These signs had red lettering which read, "Warning to all Demonstrators" followed by slightly smaller black lettering stating: "The following Court Order has barred any interference with the business of this bank." Photostats or some similar reproductive process of the restraining order were attached to the sign. Ten such signs were posted. In addition, the bank had caused a public address system to be installed with three speakers outside the building and two inside. An assistant vice president was stationed at the microphone, and a statement was prepared for him to read at certain intervals. That statement was

read repeatedly during the demonstration of October 7 and could be clearly heard inside and outside the bank building. In essence, the statement recited that the restraining order which had been issued barred any interference with the business of the bank. It warned that entry into the bank would subject a person to arrest if he was not a customer of the bank. It asked all those in the bank not transacting business with the bank to leave and warned again of arrest if any failed to do so. In addition to these measures, the bank had arranged with the Sheriff's office that two or three deputy sheriffs be present and that they have copies of the restraining order with them for service upon any who violated the terms thereof. In spite of these measures, the demonstration progressed to a point where there were people in the bank sitting and/or lying in front of the tellers' cages as well as others outside the bank who were lying underneath or in front of vehicles stopped near the bank so that those vehicles could not be moved.

These proceedings were begun in the same manner as they were in the cases of the petitioners just previously discussed and, as was true in that proceeding, were filed in the case of the original restraining order and injunction. A motion for the issuance of attachment for contempt was filed with the circuit court listing these three petitioners and two others not here involved and requesting the court order then attached.

> "* * * for violation on October 7, 1963 of the Temporary Restraining Order issued by this Court on August 30, 1963 (which is in full force and effect), in one or more of the following respects:

"(1) Physically hindering and preventing customers of plaintiff and other members of the public from entering and leaving plaintiff's place of business by locking arms in front of entrances.

"(2) By entering said banking premises and setting (sic) in, lying in, standing in, milling about, and singing and chanting therein, and thereby interfering with the proper and normal conduct of plaintiff's banking business.

(3) Standing and loitering in front of tellers' windows so as to prevent customers of plaintiff's bank from utilizing the facilities for the conduct of their proper and normal business with the plaintiff.

"(4) Harrassing (sic) plaintiff and hindering and interfering with the proper and normal conduct of plaintiff's business by entering said bank for the purpose of making change which purpose was solely to harrass (sic) plaintiff and interfere with the normal conduct of its business.

"(5) Harrassing (sic) plaintiff and hindering and interfering with the proper and normal conduct of plaintiff's business by entering said bank for the purpose of becoming customers of the bank which purpose was solely to harrass (sic) plaintiff and interfere with the normal conduct of its business.

"(6) Refusing to leave plaintiff's banking premises after having been requested to do so, and by so refusing to harrass (sic) plaintiff and interfere with the normal conduct of plaintiff's business."

The court's order also shows that it appointed Messrs. Millsap and Montrey "to present evidence of contempt." Mrs. Younge and Mr. Jones entered their appearances for these petitioners on the same day. The attachment was issued and the Sheriff brought these petitioners forthwith before the court. The court read the notice to the petitioners. It contains the same specifications as set out above from the motion, and concludes: "* * * The foregoing charges and specifications constitute offenses against the majesty of the law and the dignity and

authority of this Court and you are hereby punishable for criminal contempt." The trial of the petitioners of No. 31,778 was then in process and the trial of these petitioners was continued from time to time until October 14th when the trial began.

Before trial began on the 14th of October, a Guardian ad Litem was appointed for the petitioners Pollack and Michela Grand, they having been found to be minors. Among other pleadings and motions filed that day on petitioners' behalf was a joint return to the order to show cause for contempt. The petitioners filed a motion for a continuance, to dismiss, and for a severance. These motions were overruled and their counsel announced, "We are ready to proceed, Your Honor." The trial was concluded on October 16th and the court announced that it would render judgment on October 25th.

In the judgment entered as to each of these petitioners, the restraining order is set out, a finding made that it was in full force and effect when the acts by these petitioners occurred, the appearance of the petitioners before the court on October 7th is recited, and the notice read to the petitioners in open court is set out in full. As to the petitioners Michela Grand and Daniel Pollack, the court proceeded to find as follows:

> "It is further found that Michela Grand was aware of and had actual notice of the issuance of the Court's Restraining Order prior to her entry into the banking premises on October 7, 1963, as hereafter found; such actual notice was received by the said Michela Grand by being outside the premises of the Jefferson Bank and Trust Company on October 7, 1963, when notices concerning said Restraining Order were read over a public address system there at said bank; further, that copies of said Restraining Order were posted about the premises of the bank in such positions that the said Michela Grand saw or should have seen the same; further that while the

said Michela Grand was inside the banking premises on October 7, 1963, a copy of theCourt's Restraining Order was given to her by a Deputy Sheriff of this Court."

The court found that these petitioners had willfully disobeyed and violated the restraining order by:

"(1) Harrassing (sic) plaintiff and hindering and interfering with the proper and normal conduct of plaintiffs business by entering said bank for the purpose of making change, which purpose was solely to harrass (sic) plaintiff and interfere with the normal conduct of its business.

"(2) Refusing to leave plaintiff's banking premises after having been requested to do so and by so refusing to harrass (sic) plaintiff and interfere with the normal conduct of plaintiff's business.

"(3) By entering said banking premises and lying in said premises and thereby interfering with the proper and normal conduct of plaintiff's banking business."

These acts and conduct were found to constitute offenses against the majesty of the law and the dignity and authority of the court. These petitioners were found guilty of willful disobedience of the temporary restraining order and were to be punished as for criminal contempt.

The judgment entered as to the petitioner Peake differs only in the fact that he was not found guilty of the last specification; that of entering the bank premises and lying in them, thereby interfering with the proper and normal conduct of the bank's business.

Each of these petitioners received a different sentence. The petitioner Michela Grand received 120 days; Pollack received 60 days; and Peake received one year in jail. Each also received a fine of $500.00 and was to pay one-third of the costs.

Each of the petitioners Michela Grand, Pollack, and Peake were found to have had actual notice of the issuance of the restraining order prior to his or her entry into the bank on October 7th. This finding is amply supported by the evidence. As stated, the statement warning demonstrators against entering the bank was repeatedly read over the public address system and the testimony and photographic exhibits show that one could not enter the bank without seeing one or more of the signs containing the restraining order itself. Moreover, Michela Grand can reasonably be held to have had notice from the fact that her husband, Ian Grand, was arrested earlier along with those petitioners whose applications for habeas corpus are consolidated in 31,778 and dealt with earlier herein. The petitioner Peake was shown to have been in court during some of the proceedings regarding the trial of those who had earlier committed acts the trial court found contemptuous. In addition to the above evidence, there was testimony that each of the petitioners was served with a copy of the restraining order while he or she was in the bank on October 7th and prior to their arrest on that date.

The petitioners Michela Grand and Danny Pollack were found to have violated the restraining order by: (1) entering the bank for the sole purpose of making change in order to harass the bank and interfere with the normal conduct of its business; (2) refusing to leave the bank after being requested to do so and by so refusing to harass the bank and interfere with the normal conduct of its

business. The petitioner Peake was found to have violated the restraining order in only the manner charged in (1) and (2) above. There can be no doubt that a person found to have done any one of these three acts would be in violation of paragraphs (b) and (c) of the restraining order as those paragraphs are set out earlier herein.

The evidence as to Michela Grand was that she came into the bank at about 4:50 P.M. and walked up to the line in front of teller's window No. 10. By the time she reached the window there was a line of 7 or 8 people in back of her waiting to get to this window. When her turn came, she stood there for several minutes and was then asked to leave the bank. She made no reply, whereupon a deputy sheriff served her with a copy of the restraining order. She was again asked to leave the bank and was told that if she continued to stand in front of the cage, she would be arrested. She again made no reply but sat down on the floor in front of the tellers' cages with her back to the counter. During this time the statement previously referred to was read over the public address system at least once. It had also been read prior to her entry into the bank and carried over the outdoor speakers beginning at 4:30 P.M. This petitioner remained on the floor for some 10 to 15 minutes, either sitting down or in a prone position. During this time, she was asked to leave the bank and refused to do so. She was put on a stretcher and moved out of the bank. Photographs were introduced into evidence showing this petitioner in several positions on the floor of the bank and also as she was put on the stretcher and carried from the bank.

The evidence as to the petitioner Pollack is very similar. He entered the bank and went to window No. 10. When he reached the teller he stood before the cage. There were people in line behind him. After this continued, he was told that he would have to move; that he could not block the teller's window. The petitioner made no reply and continued to stand in the same position. He was then served with a copy of the restraining order. While this petitioner was standing in front of the teller's window, the statement warning the demonstrators was read over the public address system. He was then told that if he continued to block the window, he would be arrested. The petitioner then sat down on the floor and remained on the floor until he was carried out. Photographs introduced into evidence show Pollack on the floor, being put on a stretcher, and also being carried from the bank.

The petitioner Peake made 2 appearances in the bank. The first time he came in at about 4:40 p.m. Peake is a paraplegic and was pushed in his wheelchair up to window No. 10. He offered a $1.00 bill and was given change. He stayed there for a short time even though others were then trying to get change and then left the lobby of the bank. At about 4:55, Peake came into the lobby again. On this occasion he located himself in about the center of the lobby, where he was interviewed by representatives of news media. While Peake was in the approximate middle of the lobby, the statement warning of the issuance of the restraining order was read over the loudspeakers. While he was in that same position, several officials of the bank and at least one police officer had conversations with him. The witness Houston, an official of the bank, asked Peake if

he had any business with the bank. Peake replied that he had none but wanted to look around. Houston then asked this petitioner if he was a demonstrator to which Peake replied that he was. Houston then asked him to leave the bank and Peake refused to leave. Peake was then served with a copy of the restraining order. Mr. Ross, an officer of the bank, told Peake the bank did not want him as a customer and asked him to leave. He replied "I won't go." Peake was then warned of his arrest if he did not leave, and Peake replied "That is fine, arrest me and arrest this man behind me too," pointing to the man pushing his wheel chair. The witness Eitzman, a police officer, testified that he asked Peake if he had any business in the bank and that Peake replied he had none. Major Eitzman then told him that the bank had complained about his loitering in the lobby and asked him to leave. Peake again refused to leave.

The petitioners did not take the stand nor did they offer any testimony. Their entire defense was developed by their counsel in cross-examination of the witnesses offered by their opponents. This defense took three principal courses. First, that there were too many policemen and deputy sheriffs at the scene of the demonstration. Second, was the contention that the demonstration was justified. To develop this point, they asked questions of Mr. Ross, an officer of the bank, such as "Do you believe that every man should have a decent job, Mr. Ross?" Another witness was asked if it was true that James Peake had said that "* * * nonviolent civil disobedience was justified in the best tradition of Christ, Thoreau, Gandy (sic) and Martin Luther King; * * *" The other defense which they attempted to establish by cross-examination dealt with the fact that the bank

was charging a service fee of 25¢ when it made change for those not regular customers of the bank. There was repeated cross- examination as to whether the bank was obliged under its charter and/or by the regulations under which it operated to exchange money without a service fee to anyone who requested it. There was no evidence offered on this matter. The bank's charter or the regulations referred to were never offered as evidence nor in any way proved. Of course, the question immediately arises as to whether these petitioners are the proper parties to enforce such regulations, if any do in fact exist. We do not deem it necessary to rule the point, for assuming the petitioners to be proper parties to enforce such regulations in this proceeding, the pertinence of these defenses in a proceeding wherein the petitioners are charged with willful and deliberate violations of a lawful restraining order is too nebulous to be given greater consideration than it has been herein accorded.

The evidence sustains the finding that these petitioners had actual notice of the restraining order. The evidence also sustains the finding that the petitioners Michela Grand and Daniel Pollack were guilty, beyond a reasonable doubt, of violations of paragraphs (b) and (c) of the restraining order as found in all three of the specifications contained in the judgment entered as to those 2 petitioners and the finding that the Petitioner Peake was guilty beyond a reasonable doubt of violations of paragraphs (b) and (c) of the restraining order as found in both of the specifications contained in the judgment entered as to that petitioner.

At this point, it is appropriate to dispose of the contention advanced by these petitioners that they are "business invitees"

and not in violation of the court's order when they entered the bank. Several answers to this contention readily spring from the factual statement above. The simplest of these it is apparent from the facts that two of these petitioners entered the bank without any real purpose of transacting business therein and, in fact, did not even attempt to transact even the business of getting change. Peake did present a dollar bill to be changed on his first trip into the bank, but made no attempt to do so on his second trip. Moreover, whatever benefit these petitioners could derive from the characterization of "business invitees" upon entering the bank was certainly lost to them by their departure from that characterization when they refused to leave the bank when repeatedly requested to do so and when they conducted themselves while in the bank in the manner shown by the evidence.

The contention advanced as to the appointment of special prosecutors in 31,779 is the same as that made with regard to the petitioners whose applications are consolidated into file 31,777, and the ruling there stated is equally applicable to that contention as made by these three petitioners. With regard to the restraining order, the contentions that were contained in the joint answer filed in 31,779 and the ruling on the point made earlier herein applies as well to these three petitioners. The petitioners whose applications were consolidated into 31,779 also contend that due process of law was denied them in that they were not granted an adequate time to prepare their defense. The principles of law stated earlier herein when this same contention was advanced by those petitioners whose applications are contained in 31,778 are equally applicable to the

petitioners here involved. Of course, the evidence differs somewhat. With regard to the petitioners whose applications were consolidated into 31,779, the evidence is that their counsel announced ready for trial upon the court overruling the motion for a continuance. These petitioners fail to allege in their answer or state in their brief any facts which would lead to the conclusion that they were denied due process by the court's action in proceeding to trial after their counsel announced ready. In view of the overwhelming evidence as to the guilt of these petitioners we cannot find them prejudiced by that action. There is no merit to this contention.

It follows from what has been herein held that the petitioners Curtis, Clay, Seay, Richards, Perkins, Ford, Ian Grand, Goins, Tournour, Jones, Lee, Glenn, Michela Grand, Pollack, and Peake are not illegally restrained, and as to these petitioners our writs should be quashed and these petitioners remanded to the custody of the respondents. As to the petitioners Howard, Thompson, Marian Oldham, and Charles Oldham, we hold they are illegally restrained in that the evidence does not support the finding that they were guilty, beyond a reasonable doubt, of any of the specifications found in the judgment entered as to each of them. Accordingly they are to be discharged forthwith. All concur.

February 12, 1964

Charles E. Oldham, Esq.
3227 West Minister Place
St. Louis 8, Missouri

Dear Charlie:

I have taken the liberty of forwarding a copy of your Application for a Writ of Habeas Corpus to Lee Pfeffer who has shown such great interest in the matter and is such an extraordinarily able lawyer.

Going over the papers fairly carefully, I have a few suggestions that you may wish to consider in adding to or amending your papers. An outsider going over your papers is sometimes at an advantage in that he does not fully comprehend the situation before reading them.

(a) Do you think it might be advisable in Paragraph II on Page 1 to state boldly that the confusion of the Court as to whether this was civil or criminal contempt and lumping them together was a failure of due process?

(b) Page 3 - (g) Is the indemnity bond an aspect of civil or criminal contempt? If one or the other, shouldn't this be made clear?

(c) Page 4 - Paragraph 4. I think, if it is the fact, that it should be stated that the bank, federally supported in various ways, discriminates, and you should give the information as to Negro employment.

Does this raise a "clean hands" issue in an equity proceeding? The bank is asking for an injunction when it is guilty of improper conduct, possibly unconstitutional conduct.

(d) I do not see any explanation of the harassment attachment proceeding that went on in the Circuit Court the morning. I think this ought to be explained as part of the failure of due process in your papers.

(c) I think the question of the [illegible] versus criminal contempt should be taken from the province of counsel and the court. It can be done directly in the application, [illegible] the court rule on the merits.

By the way, is there a special procedure in both civil and criminal contempt or only in each?

Is it possible that by not delineating whether this was civil or criminal contempt, the court and [illegible] the people involved of a right to use the Fifth Amendment?

(f) More space ought to be used on the various types of sloppiness and confusion, all to showing that there was a constitutional failure on the prosecution.

Naturally we want to help as much as possible. Please keep in touch. Leonard Slater just called about the question from me to him. I made him what I hope are helpful suggestions. [illegible] will hear directly from him.

Regards. Sincerely,

CR/hm
cc: Leo Pfeffer,
General Counsel
American Jewish Congress

SAUL RACHLIN

MSS 546 SEDFRE CURTIS, ROBERT, B., ESQ. VS. MISSOURI 1967

Box 36
Folder 7

State Historical Society of Wisconsin

Please Retain Original Order

Serve on Respondent

IN THE SUPREME COURT OF THE STATE OF MISSOURI

In re:

ROBERT B. CURTIS,
an Attorney,

Respondent.

No. 53032

CITATION

THE STATE OF MISSOURI TO RESPONDENT, ROBERT B. CURTIS:

You are hereby summoned to appear before the Supreme Court of Missouri and to file your pleading to the Motion to Remove Respondent From Roll of Attorneys and For Disbarment, a copy of which motion is attached hereto, and to serve a copy of your pleading upon Walter M. Clark and David S. Hemenway, attorneys for the Bar Committee of the Twenty-Second Judicial Circuit, 611 Olive Street, St. Louis, Missouri, all within 30 days after service of this Citation upon you, exclusive of the day of service. If you fail to do so, the relief prayed in the Motion will be granted against you.

May 8, 1967

Marion Spicer
Marion Spicer, Clerk

RETURN OF SERVICE

I hereby certify that I have served the within Citation:

1. By handing on the _____ day of _____, 1967, a copy of the Citation and a copy of the Motion to the within named Respondent, _____.

2. By leaving on the _____ day of _____, 1967, a copy of the Citation and a copy of the Motion at the dwelling place or usual place of abode of said Respondent, with some person of his family, over the age of fifteen (15) years.

3. By _____

_____

_____.

ZAll done in _____ County, Missouri.

_____
Marshal, Supreme Court of Missouri

DUPLICATE
OF FILING ON
MAY 8 1967
IN OFFICE OF
CLERK SUPREME COURT

IN THE SUPREME COURT

OF MISSOURI

In re:)
)
ROBERT B. CURTIS)

No. 53032

MOTION TO REMOVE RESPONDENT FROM ROLL OF ATTORNEYS

AND FOR DISBARMENT

COUNT I

Come now Albert D. Krueger, Charles C. Allen, Jr., Milton Greenfield, Jr., William G. Guerri, Thomas V. Connelly, Dale Reaban, Herbert E. Bryant, George S. Hecker, Harold C. Ackert, Bernard Susman and Harold A. Thomas, Jr., Informants, and state to the Court as follows:

1. Informants are the members of the Twenty-Second Judicial Circuit Bar Committee, duly appointed by this Court, and are all members of the Missouri Bar in good standing.

2. Respondent, Robert B. Curtis, is an attorney licensed to practice law in Missouri, and has his office in the City of St. Louis and in the Twenty-Second Judicial Circuit.

3. This motion is filed by Informants both in their official capacity as the members of the Twenty-Second Judicial Circuit Bar Committee and as members of the Bar in good standing, in accordance with Sec. 484.200, R. S. Mo. 1959.

4. On October 24, 1963, Respondent was found guilty and convicted by the Circuit Court of the City of St. Louis, Missouri, of a crime involving moral turpitude, to-wit,

criminal contempt of Court. Respondent was fined the sum of $1000 and sentenced to serve 270 days in the City Jail of the City of St. Louis.Following his conviction, Respondent, through his counsel, sought to set aside his conviction by various applications and petitions addressed to the St. Louis Court of Appeals, the Supreme Court of Missouri, the United States District Court, Eastern District of Missouri (Eastern Division), the United States Court of Appeals (8th Cir.), and the Supreme Court of the United States. All of said tribunals refused to set aside [or modify] said conviction, which has become final. A certified copy of the original Findings of Fact and Judgment of the Circuit Court of the City of St. Louis, No. 57945-B, "In re Robert B. Curtis", is attached hereto, marked Exhibit A, and, by reference, incorporated herein.

5. Pursuant to Sec. 484.240, Respondent should be stricken from the roll of attorneys licensed to practice in Missouri and should be disbarred.

WHEREFORE, Informants respectfully move the Court to enter its order removing ROBERT B. CURTIS, Respondent, from the roll of attorneys licensed to practice law in the State of Missouri, and disbarring Respondent, in accordance with Chapter 484, R.S. Mo. 1959, all in accordance with Sec. 484.190, et seq., R.S. Mo. 1959; and that the Court enter such other and further orders as the Court deems just and proper, and that the costs of this proceeding be taxed against Respondent.

COUNT II

For Count II of their motion, Informants state and allege as follows:

1. Informants incorporate by reference all of the allegations contained in paragraphs 1, 2 and 3 and 4 of Count I hereof.

2. The actions of Respondent described in Exhibit A, constitute violations of Rules 4.01, 4.15, 4.16, 4.29, 4.32 and 4.47 of this Court, and render Respondent unfit to retain his license to practice law in the State of Missouri.

WHEREFORE, Informants pray that the Court enter its order striking Respondent, Robert B. Curtis, from the roll of attorneys licensed to practice law in the State of Missori, and that Respondent be disbarred; and that the Court make such other and further orders as the Court deems just and proper; and that all costs be taxed against Respondent.

BAR COMMITTEE, TWENTY-SECOND JUDICIAL CIRCUIT

By:_____
Albert D. Krueger, Chairman

Walter H. Clark
611 Olive St.
MA. 1-5070

David S. Hemenway

Counsel for Informants

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, STATE OF MISSOURI

IN RE ROBERT B. CURTIS

CONTEMPT OF COURT
DIVISION NO. 2

FINDINGS OF FACT AND JUDGMENT

It is hereby found that on August 30, 1963, at 1:55 P.M., in the Circuit Court of the City of St. Louis, Missouri, in Division Number Two thereof, in the case of Jefferson Bank and Trust Company, a corporation vs. Robert Curtis, William L. Clay, Charles R. Oldham, Marian Oldham, Lucien Richards, Richard Daly, Walter Hays, Rev. Charles Perkins, Norman Seay, Herman Thompson, Melvin West, individually and as representatives of a class known as St. Louis Committee of Racial Equality, Cause No. 57945, the following Temporary Restraining Order was made and entered by the Court aforesaid.

> "Temporary restraining order ordered to issue as to all defendants individually and as representatives of a class known as St. Louis Committee of Racial Equality from:
>
> "(a) Physically hindering, obstructing, interfering with, delaying, molesting or harassing other persons desiring to enter plaintiff's banking premises, from entering said premises for the purpose of conducting their business with plaintiff or for any other purpose.
>
> "(b) Congregating or loitering individually or in groups inside plaintiff's banking premises and therein engage in any acts or conduct of whatsoever character which interferes with, intimidates, harasses, hinders and annoys plaintiff's employees in the performance of their duties or other persons in the conduct of their business with plaintiff or which in any way interferes with the proper and normal conduct of plaintiff's banking business.
>
> "(c) Physically hindering, obstructing, interfering with, intimidating or in any other manner preventing customers of plaintiff and other members of the public from having the usual and customary access to tellers' windows located in plaintiff's banking premises or access to any other department or portion of said banking premises wherein plaintiff conducts its banking business.

"IT IS FURTHER ORDERED that, until the hearing of said motion and order therein, the defendants do absolutely desist and refrain from:

"(a) Physically hindering, obstructing, interfering with, delaying, molesting or harassing other persons desiring to enter plaintiff's banking premises, from entering said premises for the purpose of conducting their business with plaintiff or for any other purpose.

"(b) Congregating or loitering individually or in groups inside plaintiff's banking premises and therein engage in any acts or conduct of whatsoever character which interferes with, intimidates, harasses, hinders and annoys plaintiff's employees in the performance of their duties or other persons in the conduct of their business with plaintiff or which in any way interferes with the proper and normal conduct of plaintiff's banking business.

"(c) Physically hindering, obstructing, interfering with, intimidating or in any other manner preventing customers of plaintiff and other members of the public from having the usual and customary access to tellers' windows located in plaintiff's banking premises or access to any other department or portion of said banking premises wherein plaintiff conducts its banking business.

"IT IS FURTHER ORDERED THAT PLAINTIFF post bond in the sum of Ten Thousand Dollars ($10,000.00).

"Defendants ordered to show cause in Division 2 of the Circuit Court of the City of St. Louis, Missouri, on Thursday, September 26, 1963, at ten o'clock A.M. why a temporary injunction should not be granted as prayed."

/S/ MICHAEL J. SCOTT
August 30, 1963 1:55 P.M."

It is further found that the Temporary Restraining Order aforesaid was in full force and effect from August 30, 1963 through the present date of these proceedings.

It is further found that this cause came on on the 31st day of August, 1963, on verified application for contempt citation pursuant to Rule 92.15, Supreme Court rules; and Attachment thereupon issued to Martin L. Tozer, Sheriff of the City of St. Louis,

commanding the attachment of Robert B. Curtis, said Attachment was returned executed, and said Robert B. Curtis was committed to the City Jail until bond was given in the amount of $10,000; that Robert B. Curtis declined to furnish bond and remained in custody until September 3, 1963, when he was ordered discharged from custody by the St. Louis Court of Appeals, pursuant to Writ of Habeas Corpus, filed by him and on his behalf; that hearing pursuant to the application for contempt citation was originally scheduled to commence at 10:00 A.M. on Tuesday, September 3, 1963, but was postponed to September 4, 1963, due to the Court of Appeals hearing; that on September 4, 1963, prior to the hour set for the hearing, an application for a Writ of Prohibition was filed in the St. Louis Court of Appeals by and on his behalf; that said Court denied the application for the Writ of Prohibition in the afternoon of September 4, 1963 and that at that time, the hearing was continued until September 9, 1963; that on September 9, 1963 the hearing was again continued until September 23, 1963; that subsequent to September 9, 1963, and prior to September 23, 1963, Robert B. Curtis was served by said Sheriff with written notice pursuant to Rule 35.01 to show cause why he should not be punished as for criminal contempt, said notice having been applied for by Wayne L. Millsap pursuant to appointment by this Court for that purpose and setting forth in detail the essential facts constituting the criminal contempt charged, being signed by me and being returnable at 10:00 A.M. on September 23, 1963, in Division No. 2 of the Circuit Court of the City of St. Louis, thereby allowing him a reasonable time for the preparation of his defense.

It is further found that the hearing pursuant to the said Notice was commenced on September 23, 1963, and continued from day

to day and evidence adduced; the defendant, Robert B. Curtis appeared, was represented by counsel, had full opportunity to defend this action and presented testimony and evidence.

It is further found that defendant Robert B. Curtis, was served with a copy of the Temporary Restraining Order on the afternoon of Friday, August 30, 1963, prior to the time when the demonstrators took any steps to stand in front of the bank doors or to enter into the bank premises.

It is further found that Robert B. Curtis was represented by Attorney Raymond Howard on Friday morning, August 30, 1963, at a hearing held prior to the issuance of a temporary restraining order, and that at approximately 1:55 P.M. on Friday, August 30, 1963, the temporary restraining order aforesaid was issued by this court and personally delivered to Attorney Raymond Howard, who was then and there representing defendant, Robert B. Curtis.

It is further found that defendant Robert B. Curtis, in addition to being served with a copy of the restraining order and injunction petition, received notice of the same at a meeting attended by him and various other demonstrators on a parking lot adjacent to the scene of the demonstration at approximately 5:00 P.M. on August 30, 1963, at which time his attorney, Raymond Howard, informed him and others of the content of the restraining order and advised compliance therewith.

It is further found that defendant, Robert B. Curtis, with full knowledge and notice, as aforesaid, and acting in concert and participation with and aiding and abetting one or more of the persons named as defendants in the aforementioned Jefferson Bank and Trust Company vs. Robert Curtis, et al., did willfully disobey and violate said restraining order by:

1) Conspiring with others to violate said Restraining Order by appearing on the 30th day of August, 1963, at the Jeffer... Bank and Trust Company, 2600 Washington Avenue, St. Louis, Mo., with a crowd of more than one hundred persons, including children, and then and there singing, chanting, parading, shouting, and milling about in and around said Bank premises, and causing others to do so; conspiring with others to cause said crowd, or part of them, to lock arms in front of the entrance to the Bank premises so as to bar entry to and exit from said Bank; conspiring with others to cause said crowd, or part of them, to enter said Bank and sit in, lie in and otherwise obstruct the lobby of said Bank so that customers were prevented, hindered and delayed from having access to tellers' windows and otherwise transacting their lawful business; conspiring with others to cause said crowd of persons, or part of them, to congregate individually and in groups unlawfully inside said Bank.

2) So directing, controlling, supervising and planning, while said Restraining Order was in force, as a representative of the St. Louis Committee of Racial Equality with the right to direct, control, supervise and plan the activities of said Committee, as to violate said Restraining Order by causing members of said Committee and others: to sing, parade, chant, mill about and congregate in and around said Bank; to enter said Bank and sit in, lie in, and otherwise obstruct the lobby of the Bank, preventing, hindering, and delaying customers from access to tellers' windows and other portions of the premises; to bar entry to and exit from said Bank by locking arms in front of the entrance; and to congregate and loiter individually and in groups unlawfully inside said Bank.

3) Failing, while said Restraining Order was in force, as a representative of the Committee aforesaid, with the right to direct, control, supervise and plan the activities of said Committee and its members, and knowing that members of said Committee were violating said Restraining Order, to so direct, control and supervise said activities as to cause said violation to cease and desist.

4) Aiding, abetting and counselling others to violate said Restraining Order by engaging and participating in the conduct aforesaid.

It is further found, adjudged and decreed that the aforesaid acts and conduct constitute offenses against the majesty of the law and the dignity and authority of this Court.

It is further found, adjudged and decreed that defendant Robert B. Curtis, is guilty of willful disobedience of said Temporary Restraining Order, and is punishable as for criminal contempt.

It is adjudged and decreed that defendant Robert B. Curtis be confined to the City Jail of the City of St. Louis for the period of two hundred seventy days (270), and pay a fine to the St. Louis Circuit Clerk of Criminal Causes in the sum of One Thousand ($1,000) Dollars, and pay one-ninth (1/9) of the costs of this action, and that Martin L. Tozer, the Sheriff of the City of St. Louis, shall, without delay, remove and safely convey the said defendant, Robert B. Curtis, to the City Jail of the City of St. Louis, there to be kept, confined and treated in the manner directed by law, and the Warden of said City Jail of the City of St. Louis is required to receive and safely keep him, the said defendant, in the City Jail of the City of St. Louis aforesaid, until the judgment and sentence of the Court herein are complied with and all costs paid or until the said defendant shall be otherwise discharged by due course of law.

Michael J. Scott

Michael J. Scott
CIRCUIT COURT JUDGE

Date 10/24/63

Dfr 2.

IN THE

SUPREME COURT OF MISSOURI

In re:	)	
	)	
ROBERT B. CURTIS	)	No. 53,032
	)	
	)	

RESPONDENT'S MOTION TO DISMISS, SUGGESTIONS IN SUPPORT OF SAID MOTION TO DISMISS; AND ANSWER OF RESPONDENT.

LOUIS GILDEN
722 Chestnut Street, Suite 150
St. Louis, Missouri 63101
CHestnut 1-6607

RAYMOND HOWARD
705 Chestnut Street
St. Louis, Missouri 63101
CEntral 1-0727

Attorneys for
ROBERT CURTIS, Respondent.

RESPONDENT'S MOTION TO DISMISS INFORMANTS' MOTION TO REMOVE RESPONDENT FROM ROLL OF ATTORNEYS AND FOR DISBARMENT

MOTION TO DISMISS COUNT I

I

Comes now the Respondent and moves that Count I of the Motion filed on behalf of Informants be dismissed and for his grounds states:

A. That Informants' Motion fails to state a claim upon which relief can be granted in that criminal contempt is not a ground for disbarment.

B. 1. Criminal contempt is not a criminal offense and therefore Respondent cannot be disbarred under Section 484.240 VAMS.

2. Criminal contempt is not a crime involving moral turpitude. Further that there is no reasonable relationship between Respondent's conduct and his qualification to practice law. That if this Court should grant Informants' Motion this would be a violation of Respondent's right to due process under the Fourteenth Amendment to the Constitution of the United States, and under Article I, Section 10, of the Missouri Constitution, 1945, since he would be disbarred without any explanation by Respondent of the nature of his alleged misconduct.

C. If Respondent is found to have committed a criminal offense involving moral turpitude, then this would be without precedent. In that case Section 484.240 VAMS and the Rules of this Court would be unconstitutional as an ex post facto law in violation of Article I, Section 10, of the United States Constitution and Article 1, Section 13, of the Missouri Constitution, 1945, and unconstitutional because above Statute and Rules, as applied, are so vague and uncertain so as to deprive Respondent of due process under the Fourteenth Amendment to the Constitution of the United States and Article I, Section 10, of the Constitution of the State of Missouri, 1945.

II

A. That the Bar Committee failed to comply with the Rules as promulgated by this Court, to-wit, Rule 5.03, in that Respondent was not afforded a formal hearing before the Bar Committee. That said

Rule and the law of this State makes this formal hearing mandatory.

B. If this Court should grant Informants' Motion then Respondent would be disbarred without a hearing and without an opportunity to defend himself; and this is a violation of due process under Article I, Section 10, of the Constitution of the State of Missouri, 1945, and the Fourteenth Amendment to the Constitution of the United States as well as Article I, Section 2, of the Missouri Constitution as denying him equality under the law, and Section 484.240 VAMS would be unconstitutional as a denial of due process under Article I, Section 10, of the Constitution of the State of Missouri, 1945, and the Fourteenth Amendment to the Constitution of the United States.

III

That the Bar Committee of the 22nd Judicial Circuit lacked jurisdiction to institute disbarment proceedings against Respondent in that -

A. Members of the Bar Committee had reached opinions with reference to Respondent prior to the time that they considered the matter of Respondent and decided to proceed with the disbarment.

B. Members of the Bar Committee and their firms represented banks involved in negotiations for jobs for Negroes with Respondent as head of the Congress of Racial Equality. That said banks resisted the demands for jobs and thus these members of the Bar Committee would have interests adverse to Respondent.

C. Members of the Bar Committee and the St. Louis Bar Association issued statements with respect to the picketing of Judge Michael Scott's home and by such statements showed their bias and prejudice.

D. Members of the Bar Committee or their firms met with other attorneys and parties to plan the strategy for the prosecution of Respondent and other parties for criminal contempt in 1963, and thus would have an interest which is adverse to that of Respondent.

E. That Respondent is entitled to have an evidentiary hearing to determine the bias, prejudice and adverse interest of members of the Bar Committee of the 22nd Judicial Circuit.

F. That Respondent is entitled to have this proceeding dismissed because of said bias, prejudice and self-interest, and is

entitled to have this Court rule that said Bar Committee, because of statements of its members, cease and desist from instituting further proceedings against Respondent.

G. That if Respondent is denied this relief he has been deprived of due process under the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 10, of the Constitution of Missouri, 1945, and equality under the law under Article I, Section 2, of the Constitution of Missouri, 1945, and the Fourteenth Amendment to the Constitution of the United States.

MOTION TO DISMISS COUNT II

Comes now the Respondent and moves that Count II of the motion filed on behalf of Informants be dismissed and for his grounds states:

That Count II alleges that Respondent has violated certain Canons of Ethics under Rule 4. That Rule 5.03 was not complied with in that no formal hearing was had, and that such formal hearing is mandatory.

That if this Court rules that its Rule 5.03 is not to be applied here, then Respondent moves for dismissal of this Count on the ground that he has been deprived of due process under Article I, Section 10, of the Constitution of the State of Missouri, 1945, and the Fourteenth Amendment to the Constitution of the United States, and has been denied equality under the law under Article I, Section 2, of the Constitution of the State of Missouri, 1945, and the Fourteenth Amendment to the Constitution of the United States.

RESPONDENT REQUESTS ORAL ARGUMENT ON THIS MOTION TO DISMISS

ANSWER TO COUNT I

Comes now the Respondent and for his answer to Count I of Informants' Motion to Remove Respondent from Roll of Attorneys and for Disbarment -

1. Admits the allegations of paragraphs number 1 and 2.

2. Does not have information, knowledge or belief as to paragraph 3, and therefore said paragraph is denied.

3. Admits that Respondent was found guilty of criminal contempt of court, admits the sentence and subsequent applications, petitions and appeals to the courts set forth in paragraph 4. Admits the findings in Exhibit "A", but denies each and every other allegation contained in said paragraph 4; and more particularly denies that he was convicted of a crime involving moral turpitude.

4. Denies the allegations in paragraph 5.

5. Further answering, Respondent states that said findings as set out in Exhibit "A" have been modified by the case of Curtis v. Tozer, 374 S.W. 2d. 557 at 582. Respondent has been found guilty of criminal contempt under specifications 2 and 4; there were no findings under specifications 1 and 3.

6. That Respondent has been denied a formal hearing in accordance with Rule 5.03; that if he is denied a hearing under Section 484.240 VAMS and under Rule 5.03, then said Statute and Rule are unconstitutional as a violation of due process under Article I, Section 10, of the Missouri Constitution, 1945, and the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 2, of the Missouri Constitution, 1945, as denying him Equality Under the Law and the Fourteenth Amendment to the Constitution of the United States.

7. That if the court would hold that criminal contempt is a criminal offense and moreover is the kind of criminal offense which involves moral turpitude, then said Section 484.240 VAMS is unconstitutional for being vague and uncertain and depriving Respondent of due process under Article I, Section 10, of the Missouri Constitution, 1945, and the Fourteenth Amendment to the Constitution of the United States; also said Statute would be unconstitutional as an ex post

facto law in violation of Article I, Section 13, of the Missouri Constitution, 1945, and Article I, Section 10, of the Constitution of the United States, and the Fourteenth Amendment to the Constitution of the United States.

8. That if the Court does not grant an evidentiary hearing on the question of bias, prejudice and adverse interest on the part of the members of the 22nd Judicial Bar Committee, or fails to dismiss this action by reason of said bias, prejudice or adverse interest, then in that event this Court is depriving Respondent of due process under Article I, Section 10, of the Missouri Constitution, 1945, and the Fourteenth Amendment to the Constitution of the United States, and deprives Respondent of Equality Under the Law under Article I, Section 2, of the Missouri Constitution, 1945, and the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, Respondent prays that Count I be dismissed and that the costs of this proceeding be taxed against Informants.

ANSWER TO COUNT II

1. Comes now the Respondent and for his answer to Count II of Informants' Motion incorporates by reference paragraphs 1, 2, 3, 5, 6, 7 and 8 of the answer to Count I.

2. Denies the allegations of paragraph 2.

WHEREFORE, Respondent prays that Count II of Informants' Motion be dismissed at Informants' costs.

RESPONDENT REQUESTS ORAL ARGUMENT ON THE PLEADINGS

SUGGESTIONS IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

POINT I

A

Informants' Motion to Disbar fails to state a claim upon which relief can be granted.

The Motion that has been filed states that the Respondent has been found guilty of criminal contempt of court. No other grounds are stated for disbarment. The issue presented before this Court is whether such an allegation standing alone states a claim upon which relief can be granted. The overwhelming weight of legal authorities holds that criminal contempt is not a ground for disbarment. This fact is recognized in Missouri as well as the other forty-nine states and the federal system. The Missouri authority consists of the following:

1. Despite the fact that a large number of lawyers have been held in contempt of court - both direct and constructive - Respondent has not seen one reported case of a single Missouri lawyer who was disbarred or suspended from the practice of law in this State for civil or ciminal contempt.

2. In the case of Leimer v. Hulse, 352 Mo. 451, 178 SW2d 335, 339 (1944), this Court stated its rule that contempt alone is not grounds for disbarment:

> "Therefore, while the attorney might have been guilty of conduct on particular occasions, which could have then been punished as contempt and which alone might not be ground for disbarment, nevertheless such conduct can be considered in connection with other conduct (also violating the code of ethics established by this court) to determine whether his entire course of conduct shows unfitness to remain a member of the Bar." (emphasis ours)

If any doubt could previously have existed as to whether or not contempt of court is a ground for disbarment, that doubt has been erased by this Court's decision in In re West, 348 Mo. 30, 152

S.W. 2d 69 (1941). In the West case an attorney was charged with contempt of the Missouri Supreme Court for failure to honor a subpoena before the Advisory Committee of the Bar Association. (It should be noted parenthetically that West's contempt of court not only involved Missouri's highest court but also it involved an investigation into his professional activities.) After finding West guilty of contempt, this Court fined him $1.00 and ordered him to pay court costs of $26.00. (In the earlier case of In re West, 148 S.W. 2d 67 (Mo. Ct. App. 1941), the Respondent was reprimanded and paid costs in the amount of $17.40.) At no time in West was any mention made of any disciplinary action that related to contempt. Hence, it is clear that this Court does not regard even a contempt of its own orders, or a contempt pertaining to the practice of law, as grounds for disbarment. In contrast with West Respondent Curtis was convicted of violating an injunction of a Circuit Court which was issued only three hours before the violations were alleged to have occurred. In addition Respondent Curtis was not acting as a lawyer but only as a private citizen.

The attitude of the Supreme Court of Missouri toward disbarment for contempt of court is shared by other legal authorities throughout the nation including the United States Supreme Court. Some of these authorities are listed below:

7 C.J.S. Attorney and Client, Section 23 at 752, which is also cited in Leimer v. Hulse, supra, states:

> "While a contempt of court may constitute a ground for disbarment, ordinarily disbarment will not be ordered for contempt of court unless the contempt is of so gross a nature as to render the attorney unworthy of his office."

In In re Isserman, 345 U.S. 286 (1953), the Supreme Court refused to disbar an attorney who had been convicted of more than 17 separate acts of contempt. Mr. Justice Jackson's opinion which represented four of the Justices later became the opinion of Court when the Court's rules were changed and Isserman's disbarment set aside on rehearing. See In re Isserman, 348 U.S. 1 (1954). Justice

Jackson surveyed historically the question of disbarment for contempt and found:

> "We do not recall any previous instance, though not venturing to assert that there is none, where a lawyer has been disbarred by any court of the United States or of a state merely because he had been convicted of a contempt. But we do know of occasions when members of the bar have been found guilty of serious contempt without their standing at the bar being brought into question." 345 U.S. at 292. (emphasis supplied)

Justice Jackson then goes on to discuss the trial of William M. Tweed where three defense lawyers were found guilty of contempt on the basis that they had claimed that the presiding Judge was biased and prejudiced. One lawyer who was found guilty was Elihu Root, a noted lawyer and statesman; another was Willard Bartlett, later Chief Judge of the New York Court of Appeals; and the third lawyer was David Dudley Field, later President of the American Bar Association. None of them was disbarred or suspended from the practice of law.

3. A leading state decision particularly pertinent to the issue raised in the case at bar was recently decided by the Supreme Court of California in Hallinan v. Committee of Bar Examiners, 55 Ca. R. 288, 421 P 2d. 76 (1966). The Hallinan opinion is perhaps the only reported case in existence that delves deeply into the question of Civil Rights arrests, the existence of moral turpitude, and the effect on one's qualification to engage in the practice of law, medicine, or teaching. The court, after exhaustively covering other federal and state authorities came to the following conclusion:

> "To the extent that acts of civil disobedience involve violations of the law it is altogether necessary and proper that the violators be punished. But criminal prosecution, not exclusion from the bar, is the appropriate means of punishing such offenders. The purposes of investigation by the bar

into an applicant's moral character should be limited to assurance that, if admitted, he will not obstruct the administration of justice or otherwise act unscrupulously in his capacity as an officer of the court. We do not believe that petitioner's participation in the civil disobedience here shown can be characterized as involving moral turpitude. If we were to deny to every person who has engaged in a 'sit-in' or other form of non-violent civil disobedience, and who has been convicted therefor, the right to enter a licensed profession, we would deprive the community of the services of many highly qualified persons of the highest moral courage. This should not be done." 421 P 2d at 87.

Thus, it appears that the courts in other jurisdictions are in agreement with the Missouri Supreme Court's holdings in the West and Leimer cases, that a contempt of court is not per se ground for disciplinary action against a lawyer. And such a holding seems to be well founded in both law and common experience. For what lawyer would dare to vigorously defend his client in court if he knew that the trial judge (who may be in a bad mood that day) might hold him in contempt of court and that he may lose his license to practice as a result thereof. If the members of the Missouri Bar ever discovered that their professional hopes and aspirations rested on a decision of one judge as to whether or not a contempt had been committed - a decision from which there is no appeal - then Missouri lawyers would live in constant fear of running afoul of or displeasing all judges and the professional independence of the members of the Missouri Bar would be at an end; and they could not then risk disagreement with any judge on any matter.

B

It is clear that the Informants' Motion in this proceeding does not state a claim unless both of the following conditions

are met: (1) criminal contempt of court must be a "criminal offense" within the meaning of the Rules of this court, and (2) criminal contempt of court must be found to involve moral turpitude per se and without regard to the particular circumstances. Missouri courts, including this Court, have uniformly and without deviation held that criminal contempt of court is not a "criminal offense." The discussion in section B (1) of these suggestions infra, demonstrates, first, that criminal contempt of court has never been considered to be a "criminal offense" and, second, in section B (2), that no crime (assuming contempt of court can be so classified) necessarily involves moral turpitude without regard to the circumstances.

1. A crucial issue before this court is whether criminal contempt is a criminal offense. Section 484.240 VAMS states:

> "If the charge alleges a conviction for any criminal offense involving moral turpitude, the court shall, on production of the record of such conviction, remove the attorney so convicted or suspend such attorney from practice for a limited time, according to the nature of the offense, as the court may deem just and without further trial."

This Court in the case of Osborne v. Purdome, 244 S.W. 2d 1005, 1012 (1951), states:

> "Clearly, contempt proceedings are not criminal cases within the meaning of the Constitution, Statutes and case law of Missouri."

This conclusion was reached after this Court stated that the Constitution does not invest the supreme court or courts of appeal with original jurisdiction of criminal actions, yet they have the power to punish for contempt. The rationale is also reached because defendant does not have a right to a trial by jury and is not tried under the Criminal Code. This was restated in the case of Osborne v. Purdome, 250 S.W. 2d 159, 163 (1952). Again in the case of Osborne v. Owsley,

364 Mo. 548, 264 S.W. 2d 332, 333 (1954) the Court held that -

"A prosecution for criminal contempt is not itself a criminal case but a proceeding inherent in the court - a proceeding sui juris. ..."

and the Court reaffirmed the Osborne v. Purdome case (supra) as authority - "contempt proceedings are not criminal cases."

Later in the case of State v. Baldwin, 358 S.W. 2d 18, 26 (1962), the Court again reaffirmed and restated that a criminal contempt proceeding is not a criminal case. Then in the case of Curtis v. Tozer, 374 S.W. 2d 557 (Mo. Ct. App. 1964), the case involving this Respondent, the St. Louis Court of Appeals stated at 581:

"We deny that such proceedings are criminal in nature."

As recently as Ex parte Miles, 406 S.W. 2d 107 (Mo. Ct. App. 1966), a case decided in August, 1966, the Kansas City Court of Appeals also stated:

"We deny that such proceedings are criminal in nature."

By repeated restatement of the above proposition, it is clear that the law in this state is that criminal contempt is not a crime. Therefore it certainly could not be a "criminal offense" within the meaning of Section 484.240 VAMS. Thus Count I of Informants' Motion must fail and be dismissed since it fails to state a claim upon which relief can be granted. If this Court dismisses Count I, Count II which relies on the Canon of Ethics under Rule 4 must also be dismissed so that the procedure outlined by Rule 5 may be followed by the Bar Committee.

2. Under Missouri law Respondent's conduct did not involve moral turpitude, and to disbar Respondent where there is no reasonable relationship between his conduct and his ability to practice law would violate his right to due process of law under the Fourteenth Amendment to the Constitution of the United States, and under Article I, Section 10 of the Missouri Constitution, 1945.

In 7 C.J.S. Attorney and Client, Section 21, at 737-739, (including the 1967 supplement), crimes involving moral turpitude

are discussed and the following crimes have been listed as moral turpitude:

> "Adultery, arson, attempting to evade federal income taxes, barratry, bigamy, blackmail, bribery or attempted bribery, concealment and disposition of assets with criminal intent, felonious conspiracy, such as racketeering, conspiring with a bankrupt to conceal his property, criminal conspiracy to smuggle opium, to violate the Espionage Act, or the Federal Prohibition Act, dueling, embezzlement, extortion or attempted extortion, falsifying bank reports, forgery, forgery in the second degree, fornication, fraud in procuring organization of corporations, illegal manufacture, possession or sale of intoxicating liquor, knowingly receiving stolen property with intent to convert, larceny, grand larceny or attempted grand larceny, libel, making fraudulent proof of loss on insurance contract, murder, mutilation and destruction of public records, obtaining money under false pretenses, offense against pension laws, perjury, or subornation of perjury, seduction under promise of marriage, violations of Blue Sky Laws, defrauding the government or individual, violation of the Smith Act, falsification of notary juris, filing a false FHA Certificate, lewdness, wire tapping, passing counterfeit obligations of the United States, and intentional violations of the Corporation Securities Act, violation of the Draft Act, willful publication of false and scandalous matter, willfully secreting public records and using the mails to defraud."

Nowhere in this whole compendium of actions gathered from throughout the country has criminal contempt ever been listed or cited as a crime involving moral turpitude.

Count I states that Respondent was fined the sum of $1,000.00 and sentenced to 270 days in the City Jail. One can compare this to the case of In re West, supra. This Court held that West had already suffered because of his professional misconduct. This Court

went on to say that:

"The obligation upon a lawyer to respect the process of this Court is certainly greater than that of a layman."

But this Court sensed the punishment that had already been given to West and, in its great fairness, found him guilty of contempt for failure to obey the subpoena and fined him $1.00 and the court costs of $26.00.

This Court is conscious of the punishment already inflicted upon Respondent Curtis. The fine that he had to pay, and the jail term that he had to serve would make one see that he has been punished enough. To now deprive him of his bar license would be oppressive and contrary to the philosophy expressed in the West case.

In the case of Sachar v. The Association of the Bar of the City of New York, 347 U.S. 388, (1954), the Supreme Court of the United States stated that no moral turpitude was involved although Sachar was found guilty of criminal contempt in the district court, and although the district court for other reasons had disbarred Sachar the Supreme Court of the United States reversed, holding that permanent disbarment was unnecessarily severe. (emphasis ours) Also, in the later case of The Association of the Bar of the City of New York v. Isserman, 271 F. 2d 784 (2d Cir. 1959), although Isserman was guilty of contempt he was not disbarred since such action was unnecessarily severe.

Nowhere in the Motion filed by Informants are there facts set out relating to Respondent's conviction of criminal contempt to his ability to practice law. Nowhere is there a complaint as to his role as an attorney. In fact, the reverse is true. The alleged acts constituting the contempt were performed outside of his profession.

"Criminal contempt of court" covers a multitude of sins. It can range from appearing in court without a tie to suborning perjury. It is obvious that some contempts, such as a tactless remark in the heat of a protracted and bitterly contested lawsuit, could never be considered to involve moral turpitude. Others, such as suborning perjury, might be considered to reflect moral

turpitude. Still others, such as disobedience to a court order, might or might not, depending upon the circumstances. But surely it is plain that whether an act does or does not involve moral turpitude depends upon all of the circumstances surrounding the act, including the actor's motive and intent. But, if Informants' Motion in this proceeding is granted, Respondent will be denied the opportunity to explain the nature of his alleged misconduct.

There was no morally reprehensible misconduct on the part of Respondent and to take his bar license from him without a showing of such misconduct would be a deprivation of due process under the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 10 of the Constitution of Missouri, 1945.

C

Respondent contends that Section 484.240 is unconstitutional if applied to him since no previous standard has been set out in the words "moral turpitude" so that a party found guilty of criminal contempt would know that this would be encompassed within these words of general classification.

If, then, criminal contempt of court is held to be a "criminal offense" within the meaning of the Statute and Rules of this Court contrary to the unbroken line of decisions emanating from Missouri courts in the past, and if it is held to involve "moral turpitude", a decision which would be utterly without precedent in the whole United States, then disciplining Respondent under that Statute and Rules of this Court in this proceeding would be unconstitutional, first because it would be an ex post facto law in violation of Article I, Section 10 of the United States Constitution, and Article I, Section 13 of the Missouri Constitution, 1945, and, second, because the Statute and Rules as so applied would be so vague and meaningless that they would fail to give adequate warning of the conduct they prescribe and thus would deprive Respondent of due process of law under the Fourteenth Amendment to the Constitution of the United States and Article I, Section 10 of the Constitution of the State of Missouri, 1945.

One of the earliest cases, and a case involving the State of Missouri, Cummings v. Missouri, 71 U.S. (4 Wall) 277 (1866) states:

> "By an ex post facto law is meant one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required. ... Judge Marshall defined an ex post facto law to be one 'which renders an act punishable in a manner in which it was not punishable when it was committed.'"

Going further, a more recent Supreme Court case, Bouie v. City of Columbia, 378 U.S. 347, 354 (1964), the Court held:

> "When a State Court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case it thereby deprives him of due process of law in its primary sense of an opportunity to be heard and defend his substantive right. Brinkerhoff Faris Trust & Savings Co. v. Hill, 281 U.S. 678."

Also referring to the case of Schware v. Board of Bar Examinations of New Mexico, 353 U.S. 232 (1957), Justice Frankfurter in a concurring opinion stated at 248:

> "...legislation laying down general conditions of an arbitrary or discriminatory character, may, like other legislation, fall afoul of the Fourteenth Amendment."

Applying Cummings, Bouie and Schware to the situation at hand nowhere has a party been deemed guilty of a crime involving moral turpitude with respect to a conviction for criminal contempt, and if this Court should so rule then the ruling would be unconstitutional as being ex post facto; also this Court would be denying the Respondent due process of law under the Fourteenth Amendment of the Constitution of the United States, and Article I, Section 10 of the Constitution of this State.

POINT II

A

The procedures adopted by the Bar Committee failed to comply with the Rules as promulgated by this Court.

It is submitted that, as a matter of procedure, this Motion for disbarment should be dismissed because the Bar Committee of the 22nd Judicial Circuit has failed to notify Respondent and failed to have Respondent present before it and cause a formal hearing to be held before this original proceeding was filed with the Missouri Supreme Court. It appears that in the last eighteen cases filed with this Court by a Circuit Bar Committee or the Advisory Committee, hearings pursuant to Supreme Court Rule 5 were held before proceedings were instituted. In most of the cases of conviction of a crime (income tax evasion) the lawyer instituted the action himself and the case was then referred to the Advisory Committee for hearing. The only doubtful case is In re Lurkins, 374 S.W. 2d 67 (1964) where it appears that possibly there was no Rule 5 hearing before the Bar Committee filed a Motion to disbar. (For a complete breakdown of procedures employed in the last eighteen disbarment cases see Appendix A).

In the case of State ex rel. Chubb v. Sartorious, 175 S.W. 2d 783, 786, this Court en Banc said that Rule 36 (now Rule 5):

> "...certainly does provide an exclusive mode of procedure for all such proceedings as are initiated by or submitted to the Bar Committee ... " (emphasis supplied)

Rule 5.03 VAMR states:

> "If, upon any such investigation a majority of the Committee finds that there is reasonable cause to believe that any member of the Bar under investigation is guilty of professional misconduct, it shall cause a formal hearing to be held upon notice to the accused, at which hearing the accused may be heard and may produce evidence to refute the charge."

Under the Sartorious case the Bar Committee is limited to the exclusive mode of procedure as stated and prescribed in Rule 5.03. In this case Respondent is without information or knowledge as to whether an investigation was held by the Bar Committee, but he denies that there was any formal or informal hearing before the Bar Committee, and denies that he received any notice of such a hearing, and denies that he was present to be heard and to produce evidence to refute the charge. In fact, Informants' Motion nowhere sets out that said mandatory proceedings took place. In lieu of these mandatory proceedings the Bar Committee has filed this Motion before this Court even though the exclusive remedy was to proceed under the Rules.

The method of procedure, as employed by this Bar Committee, is to have Respondent disbarred without a hearing before it, and without a right to refute the charges. It further compounded the violations of the rules, by making the charges public, when the rules of this Court require that record of all investigations and formal or informal hearings shall not be made public unless ordered by this Court, or the accused shall so request, or unless the Committee shall file an information thereon as provided in the rules.

A definitive statement on disbarment procedures has recently been published by the Missouri Bar and the Missouri Bar Administration entitled Manual on Unauthorized Practice and Grievance Procedures. This Manual reaffirms the existing procedures and proudly states that Missouri procedures provide due process to every lawyer and that no disbarment case has ever been reversed by the United States Supreme Court. The Manual states at 1-7 and 1-8:

> "When the Advisory Committee was holding hearing on proposed amendments to Rule 36 it was contended that a lawyer under investigation should be given notice prior to any inquiry by a Bar Committee." (emphasis ours) The Advisory Committee's report to the court urged the necessity for an initial inquiry and stated:
>
> "In this connection the observations of Judge Cardozo

in the outstanding decision on the subject, People ex rel Karlin v. Culkin, 248 N.Y. 465, 172 NE 487, 60 ALR 851; 858-9 will be recalled:

'Preliminary inquiry there must be, at least to some extent, before a decision can be reached whether to prosecute at all. ... The argument is pressed that, in conceding to the court a power of inquisition, we put into its hands a weapon whereby the fair name of a lawyer, however innocent of wrong, is at the mercy of the tongue of ignorance or malice. Reputation in such a calling is a plant of tender growth, and its bloom, once lost, is not easily restored. The mere summons to appear at such a hearing and make report as to one's conduct may become a slur and a reproach. Dangers are indeed here, but not without a remedy. The remedy is to make the inquisition a secret one in its preliminary stages.'"

"The foregoing makes clear the origin and the reasons for the rule on confidentiality. In four instances after final decisions by the Supreme Court of Missouri in disciplinary cases, the Respondent has applied for certiorari to the Supreme Court of the United States, and in each instance the writ has been denied. The procedure is exacting. The Bar Committees must make a preliminary informal investigation. If the situation warrants, a formal hearing on charges is held before the Committee. Respondent has notice and is given a transcript of the informal testimony. The witnesses are tendered for confrontation and cross-examination. Only if the formal hearing warrants a finding of probable cause, is an information filed in Court and the matter made public." (emphasis supplied)

B

The method by which the Respondent is brought before this Court for disbarment under the Statute violates the guarantees of Article I, Section 10, of the Constitution of the State of Missouri, 1945, and the Fourteenth Amendment to the Constitution of the United

States.

The Bar Committee is asking this Court to disbar Respondent without a hearing and without an opportunity to defend himself. In the case of State ex rel Shackelford v. McElhinney, 241 MO. 592, 145 S.W. 1139 (1912), this Court said that:

> "The right of an attorney to practive law is a valuable property right, which cannot be taken from him by an arbitrary act of the court, but only upon a judicial hearing on charges legally presented, in which he is given a full and fair opportunity to be heard in his own defense."

The Court then went on to say:

> "The authorities also uniformly hold that an arbitrary order of a court, depriving a duly licensed attorney at law his right to practice law, is not due process of law; and under the federal and state Constitutions such order would be null and void. It is a valuable right which an attorney cannot be deprived of, except by the judgment of a court of competent jurisdiction, after a full opportunity has been accorded him to be heard in his own defense."

The basic foundations of our form of government require that safeguards be given everyone, such as a hearing, opportunity to be present and to defend. The Supreme Court of the United States in two early decisions decided this principle. The one case Ex Parte Robinson 86 U.S. (19 Wall) 505, 512 (1874), states:

> "Before a judgment disbarring an attorney is rendered, he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense," and in the other, Ex Parte Bradley, 74 U.S. (7 Wall) 364 (1868), the Court held that the Supreme Court of the District of Columbia had no jurisdiction to disbar an attorney for contempt committed before another court. Such Supreme Court possessed no power to punish him upon an ex parte proceeding without notice or opportunity of defense or explanation of misbehavior.

A case which stands for the proposition that punishing for criminal contempt will not justify the court to arbitrarily perform acts with relation to that party without permitting him to have a hearing, is the case of Hovey v. Elliott, 167 U.S. 409 (1897). That Court held that a court possessing plenary power to punish for contempt unlimited by statute, has not the right to summon a defendant to answer and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answers from the file, supress the testimony in his favor and condemn him without a consideration thereof and without a hearing on the theory that he has been guilty of contempt of court.

The principle is of such great consequence that in the case of Selling v. Radford, 243 U.S. 46 (1917), the Supreme Court of the United States stated that it has appellate jurisdiction to review a disbarment where the State procedure was wanting in due process.

An Eighth Circuit case involving a Missouri lawyer, is the case In re Noell, 93 F. 2d 5,6 (8th Cir. 1937), in which the court stated:

> "A Court's sentence pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. Windsor v. McVeigh, 93 U.S. 274, 277, 278."

This Court was called on recently to decide the principle of a right to a hearing in In re Morrell v. Harris, No. 52,424, decided July 10, 1967.

What is being attempted here by the Bar Committee is to obtain a judicial decision of disbarment by this Court without affording the Respondent the very basic and fundamental concepts afforded all men brought into court - "ample opportunity for explanation and defense," Ex Parte Robinson, supra.

If this Court decides that the Statute controls and that no hearings are necessary here, whether before the Court, or a Commissioner, then the Section 484.240 VAMS is unconstitutional for not affording the

Respondent the right and opportunity to be heard and defend himself in answer to the charges, and that said Statute violates Article I, Section 10 of the Constitution of the State of Missouri, 1945, and the Fourteenth Amendment to the Constitution of the United States.

POINT III

The Bar Committee of the 22nd Judicial Circuit lacked jurisdiction to initiate disbarment proceedings against Respondent because of bias, prejudice, and special interest of some members of the Bar Committee.

There are members of the 22nd Judicial Bar Committee, the Informants in this proceeding, who are biased and prejudiced, and have interests adverse to the interests of the Respondent. That these members reached opinions with reference to Respondent prior to the time of the Bar Committee's consideration of this matter and decision to proceed with the disbarment before this Court. As reported in Curtis v. Tozer, 374 S.W. 2d 557 (Mo. Ct. App. 1964), Respondent, prior to the time of his being cited for contempt, as head of the Congress of Racial Equality, had been in consultation with a number of banks in the downtown St. Louis area, including the First National Bank in St. Louis, Boatmen's Bank, Mercantile Trust Company, and the Security Trust Company, with respect to employment for Negroes in these banks. Some lawyers of this Bar Committee and members of their firms have represented the banks involved in resisting CORE'S demand for jobs, and by reason of such representation members of this Bar Committee and their firms who met during the contempt proceedings with their clients and then in concert with other attorneys and parties planned the strategy and legal procedure for the prosecution of Respondent and other parties for criminal contempt in 1963. Respondent requests that this Court have an evidentiary hearing to determine whether any of the members of the Bar Committee or their firms, participated in planning the strategy of the contempt proceedings. That your Respondent is attaching hereto Appendix B, which sets out

the Committee member, his firm, the bank client, and the citations of cases where the law firms are listed as counsel for the banks; the same banks which were in negotiations with Respondent.

In addition, Respondent is attaching a statement of the President of the St. Louis Bar Association, a statement of Professor Jules B. Gerard and the reply to his statement by certain members of the local bar. (Appendix C,D and E) (These statements were published in the local press.) It is apparent from reading the following opening sentence of the reply that these lawyers suggest that they are impartial and disinterested critics of Mr. Gerard's statement: "As members of the bar, practicing law in the St. Louis area, we have carefully reviewed both the statement of John R. Barsanti, President of the Bar Association of Metropolitan St. Louis and the recent letter of Jules Gerard, Professor of Constitutional Law at Washington University School of Law, published on the subject of the demonstrations at the home of Judge Michael Scott." The statement fails to mention that four of the seven signatories [James A. Stemmler, Harold A. Thomas, Jr., (who is also one of the Informants in this proceeding), Edward E. Murphy, Jr. and Edgar T. Farmer] were members of the Executive Committee of the St. Louis Bar Association, which committee actually wrote the statement released by John Barsanti, President of the St. Louis Bar Association, or approved the wording of the statement before it was released in the name of the St. Louis Bar by its President. 1 Am. Jur. 2d Administrative Law, Sec. 64 (1962), states at 860 and 861:

> "An administrative officer exercising judicial or quasi-judicial power is disqualified or incompetent to set in a proceeding in which he has prejudged the case, or in which he has a personal or pecuniary interest...or where he is biased, prejudiced, or labors under a personal ill-will toward a party."

In the case of In re Weston Benefit Assessment Special Road District of Platte County, 294 S.W. 2d 353, 356, (Mo. Ct. App. 1956):

> "If a disqualified member of an administrative body participates in the hearing and determination, it makes the decision void or

at least voidable at the instance of a party aggrieved who has made timely protest, even though his presence was not required to constitute a quorum or a majority of the board could have acted legally without him."

"We think this rule is sound because the participation of the disqualified member in the proceeding may have influenced the opinion of the other members. Such a possibility should be avoided. ... To hold otherwise would be to deny the fundamental right to a fair hearing." (Emphasis ours)

Applying this standard to the instant case, Respondent believes that an evidentiary hearing as to the prejudice or special interests of the members of the Bar Committee, and their right to participate in a free, unbiased, unprejudiced determination of disbarment should be granted by this Court. Even if it is found that only one member had a special interest this would make the determination of the Bar Committee void in accordance with the Weston case.

It is Respondent's contention that if such an evidentiary hearing disclosed any special interests, bias or prejudice on the part of any member of the Bar Committee, then this proceeding would be void ab initio. It is important to make this determination before there is any further deliberation on this matter. The appendices attached to this proceeding show reasonable cause and ground for this evidentiary hearing.

It is apparent then, that a member, or members, of the Bar Committee, were so intimately involved in the hiring policies of the St. Louis banks, the subsequent contempt cases, and the controversy surrounding the picketing of Judge Michael Scott's home, that Respondent could not possibly receive a fair hearing before the Bar Committee as presently constituted.

If Informants' Motion to Disbar is allowed to stand under these circumstances, then Respondent has been denied due process under the Fourteenth Amendment to the Constitution of the United States and also

under Article I, Section 10, of the Constitution of Missouri, 1945, and has been denied Equality Under The Law under Article I, Section 2, of the Constitution of Missouri, 1945 and the Fourteenth Amendment to the Constitution of the United States.

Further, Respondent moves that the Motion to Disbar be dismissed and that the Court direct the Bar Committee of the 22nd Judicial Circuit to cease and desist from instituting further proceedings against Respondent pertaining to his conviction for criminal contempt, since the Committee as presently constituted, lacks the jurisdiction to initiate a disbarment or disciplinary proceeding against Respondent because some of its members were involved in the prosecution of Respondent in the contempt case; because some of its members had reached an opinion with respect to Respondent prior to the time of initiation of this matter; and because some of its members had adverse interests to that of Respondent because of their representation of certain banks which were resisting the demands for jobs for Negroes.

SUMMARY

It is respectfully submitted by way of Summary, that Count I of Informants' Motion should be dismissed,

1. In that disbarment would deprive Respondent of substantive due process; that conviction of criminal contempt is not a ground for disbarment, nor is it a criminal offense, nor a criminal offense involving moral turpitude, and if it is deemed to be one then said Section 484.240 VAMS is unconstitutional and one that would be ex post facto if applied to him.

2. In that disbarment would deprive Respondent of procedural due process, and the Bar Committee has not complied with formal hearing requirements of Rule 5.03.

3.(a) In that disbarment would be lacking in due process because of the Bar Committee's lack of jurisdiction in that members of the Committee engaged in the publicity and notoriety of the proceedings with respect to Respondent; in that members of the Committee engaged in the controversy over the picketing of Judge Michael Scott's home, as evidenced by the second statement made by the St. Louis Bar Association, the statement by Professor Jules Gerard, and the reply to Professor Gerard's statement, and in that members of the Bar Committee, or their firms were involved with Respondent's contempt conviction.

(b) And that if this Court should rule in favor of Respondent on this point and the Court feels that further proceedings are necessary, then Respondent requests a hearing by the Advisory Committee in accordance with Rule 5.17(c).

It is respectfully submitted that Count II of Informants' Motion be dismissed,

1. In that Count II relates to Rule 4, or the Canon of Ethics, and Rule 5 governs the procedure to be employed.

2. In that Respondent has not received a notice to appear before

the Bar Committee, nor had a formal hearing so that he could be heard and present evidence in his own behalf.

3. And that if this Court rules in favor of Respondent on this point, and this Court feels that further proceedings are necessary, then Respondent requests a hearing by the Advisory Committee in accordance with Rule 5.17(c).

LOUIS GILDEN
Suite 1501, 722 Chestnut Street,
St. Louis, Missouri 63101

RAYMOND HOWARD
705 Chestnut Street,
St. Louis, Missouri 63101

Attorneys for
ROBERT CURTIS, Respondent.

APPENDIX "A"

PROCEDURES USED FOR LAST EIGHTEEN CASES OF DISCIPLINARY ACTION

ME OF CASE	PROCEEDINGS INSTITUTED UNDER RULE 5 BY CIRCUIT BAR COMMITTEE OR ADVISORY COMMITTEE AND COMMISSIONER APPOINTED BY SUPREME COURT	PROCEEDINGS INITIATED BY RESPONDENT AND CASE REFERRED TO ADVISORY COMMITTEE AND COMMISSIONER APPOINTED BY SUPREME COURT	CONVICTION OF CRIME I VOLVING MORAL TURPITU
E MATTES, SW2d 54 e: Jones-Unreported, 1966	UNCONTESTED NO COMMISSIONER APPOINTED		
E WILSON, SW2d 914			
E LURKINS, SW2d 67	APPARENTLY NO RULE 5 HEARING BEFORE FILING		
E McMULLIN, SW2d 151			
E WINES, SW2d 328			
E FOLEY, SW2d 1			
E RANDOLPH, SW2d 91			
E McLENDON, SW2d 56		RULE 5 HEARING BEFORE ADVISORY COMMITTEE BEFORE FILING ACTION	
E DOWNS; SW2d 679			
E CANZONERI, SW2d 30			
E KOHLMEYER, SW2d 249			
E SYMPSON, SW2d 808			
E LANDON, SW2d 553			
RE MOON, SW2d 935			
RE WOODWARD, SW2d 385			
RE SPEISER, SW2d 656			
RE VEACH, SW2d 753			
RE OLIVER, SW2d 648			

ES OF DISCIPLINARY ACTION

TED CUIT VISORY SSIONER E COURT	PROCEEDINGS INITIATED BY RESPONDENT AND CASE REFERRED TO ADVISORY COMMITTEE AND COMMISSIONER APPOINTED BY SUPREME COURT	CONVICTION OF CRIME INVOLVING MORAL TURPITUDE	VIOLATION OF CANONS OF ETHICS
MISS-			
5 ING			
	RULE 5 HEARING BEFORE ADVISORY COMMITTEE BEFORE FILING ACTION		

APPENDIX "B"

ANALYSIS OF BANK CLIENTS OF SOME MEMBERS OF THE BAR COMMITTEE OF THE 22ND JUDICIAL CIRCUIT AND THEIR LAW FIRMS AND POSSIBLE SPECIAL INTEREST AND PREJUDICE TO RESPONDENT RESULTING THEREFROM

COMMITTEE MEMBER	COMMITTEE MEMBER'S LAW FIRM	BANK CLIENTS
CHARLES ALLEN JR.	LEWIS, RICE, TUCKER, ALLEN & CHUBB	BOATMENS NATIONAL BANK; ST. LOUIS UNION TRUST CO.*
WILLIAM GUERRI	THOMPSON, MITCHELL, DOUGLAS, & NEILL	MERCHANTILE TRUST COMPANY; BANK OF ST. LOUIS
THOMAS V. CONNELLY	BRYAN, CAVE, McPHEETERS & McROBERTS	FIRST NATIONAL BANK OF ST. LOUIS
HAROLD THOMAS JR.	FORDYCE, MAYNE, HARTMAN, RENARD & STRIBLING	MERCHANTILE TRUST COMPANY
WALTER M. CLARK Committee Counsel	ARMSTRONG, TEASDALE, ROOS, KRAMER & VAUGHAN	ST. LOUIS UNION TRUST COMPANY;* SECURITY TRUST COMPANY

* St. Louis Union Trust Company is affiliated with First National Bank of St. Louis

Please see the following cases for proof of existing lawyer-client relationships

Merchantile Trust Co. v. Muckerman, 377 SW2d 355
Merchantile Trust co. v. Sowell, 359 SW2d 719
St. Louis Union Trust Co. v. Blue, 353 SW2d 770
St. Louis Union Trust Co. v. Grove, 370 SW2d 375
Bolles v. Boatmens National Bank, 255 SW2d 725
Flynn v. First National Bank, 284 SW2d 573
Cook v. Bank of St. Louis, 297 SW2d 607
Four-Three-O-Six Duncan v. Security Trust Co., 372 SW2d 16
Cassel v. Security Trust Co., 393 SW2d 443

APPENDIX "C"

St. Louis Post Dispatch
20 April 67

3A

BAR ASSAILS HARASSMENT OF JUDGE SCOTT

John R. Barsanti Jr. Cites Picketing of Jurist's Home

The Bar Association of Metropolitan St. Louis is concerned about the personal harassment to which Circuit Judge Michael J. Scott has been subjected as a result of the Jefferson Bank & Trust Co. case, John R. Barsanti Jr., association president, said yesterday.

"The repetitive picketing of his home and the hanging in effigy leave us, as lawyers, not only appaled but also disturbed for the rule of law," he said.

He referred to activities of ACTION, a civil rights group that has picketed Judge Scott's home almost nightly for the last several weeks. Derogatory signs and effigies of the judge have been hung from trees in front of his home.

In a statement issued in behalf of the Bar Association, Barsanti said that dissent is a significant part of the structure and process of law, but that dissent must respect legal processes because it is preserved by them.

"The personal harassment of any judge must be condemned as a dangerous technique of dissent," Barsanti said. "In aiming at personality, it misses the real target of principle, and this misdirection is violent to the cause of all principle and reasoned good faith. . The administration of justice is not and cannot be allowed to become a contest of personal wills and ordeals."

He said that the rule of law is not the rule of men. Complete agreement with a judicial decision is neither expected nor desired, he said, but dissent must maintain this concept of rule of law or the system, including the protection it affords minority roups, would perish.

The demonstrations at Judge Scott's home were begun when persons convicted of contempt of court in 1963 civil rights demonstrations at the Jefferson Bank were returned last month to jail after legal appeals were exhausted. Judge Scott had found the bank demonstrators guilty of violating an order he issued prohibiting interference with the bank's operations. He imposed sentences of 60 days to a year in jail and fines of $500 and $1000 each.

APPENDIX "D"

STATEMENT OF JULES B. GERARD, ASSOCIATE PROFESSOR OF CONSTITUTIONAL LAW, WASHINGTON UNIVERSITY, REGARDING THE ST. LOUIS BAR ASSOCIATION'S INTERVENTION IN THE JEFFERSON BANK DISPUTE

For release, Immediate

Last Wednesday, the Bar Association of Metropolitan St. Louis, speaking through its president, John R. Barsanti, Jr., intervened in the Jefferson Bank dispute. Barsanti acted, he said, because the Association was "appalled" by the picketing of Judge Scott's home, and was concerned about "the rule of law."

As a member of the Association, and as a teacher of constitutional law, I am appalled by the Association's intervention. I am appalled because it was made on behalf of a "rule of law" which always has been considered a wart on the face of American justice, and which any intelligent reader of Supreme Court decisions would know is moribund, if not dead, indicating an unprofessional ignorance of constitutional law.

The intervention was on behalf of an irrelevant principle. Barsanti is reported (St. Louis Post Dispatch, April 20, 1967, p.3a col.8) to have said:

> "The personal harrassment of any judge must be condemned as a dangerous technique of dissent. In aiming at personality, it misses the real target of principle...
> "....the rule of law is not the rule of men."

I suppose few would disagree with that statement in the abstract. To give a current example, few would critize a judge because he felt compelled by Supreme Court decisions to dismiss a criminal case. But the Association's statement would make it appear that Judge Scott's decision was compelled by principle.

On the contrary, it is precisely because his decision was without principle...was, in fact, a rule of man and not of law...that the demonstrations are taking place. The facts are:

(1) The "law" the demonstrators were convicted of violating was not a state statute or city ordinance, but an injunction issued by Judge Scott.

(2) Two of the demonstrators who remain in jail have consistently claimed innocence, and the third has consistently claimed he was unaware of the terms of the injunction.

(3) Usually in a criminal trial, the defendant must be proved guilty beyond a reasonable doubt. If that standard had been applied in this case, the case would have been thrown out of court. And this is true even if one considers only the evidence offered by the prosecution.

(4) The demonstrators were convicted by Judge Scott himself, not by a jury. It should be remembered that the St. Louis Court of

Appeals found no evidence to support the convictions of four of the nine original defendants, eventhough less proof than beyond a reasonable doubt was required. In other words, given additional room for error, Judge Scott was still wrong in four cases out of nine.

(5) Judge Scott set bond at $10,000. The sole purpose of requiring bond is to make sure the defendant will show up for trial. But two of the three who remain in jail surrendered to the court voluntarily. Futhermore, the amount was fantastically high. Bonds of that size are set on the average in the City of St. Louis in less than 5 percent of serious felony cases...such as murder. It normally costs a minimum of $1,000 to make a bond that high. All the defendant gets for it is his freedom until the day of his trial. The financial burden imposed upon these defendants was, therefore, unreasonably severe and completely unnecessary.

(6) The sentences imposed in this case were incredibly harsh, even if one believes that all of the defendants are guilty as sin. A few years ago, a task force of students in this law school researched every contempt case ever reported in the United States. No case the students could find remotely authorized the sentences imposed here.

In summary, Judge Scott can be shown to have acted arbitrarily and vindictively in a case in which he himself made a debatable finding that the defendants are guilty of violating a law he himself made, and for which he himself imposed sentences that were without precedent in United States legal history.

What "concept of the rule of law" to quote the Association's statement again, is embodied here? I ask you. It is true our legal system has permitted such travesties in the past. At least it did until the Supreme Court's decision in the Ross Barnett case three years ago, a decision which came too late to help these defendants. But just because our legal system doesn't guard against every abuse doesn't mean that abuses are typical of it. And it certainly does not mean that the abuse is representative of justice.

I applaud the action of the demonstrators at Judge Scott's home. The demonstrators are more perceptive than the Bar Association. They know that this case is not representative of American justice, and that the blame for this lies with Judge Scott, not with our legal system.

If any significant number of our citizens ever believes that the Jefferson Bank case is an example of the rule of law in action, then heaven help us all!

Louis Post Dispatch August 25, 1963

ST. LOUI

1963, St. Louis Post PAGES 1—26A ST

ouis Banks, Clothing Firms Targets in CORE Job Drive

ct Action Planned Against Any e Discriminating Against Negroes

tors for the Congress to eliminate alleged discrimina-
l Equality will meet tory hiring practices by business
resentatives of down- firms started about 18 months
ks and clothing firms ago. He said negotiations with
in a stepped-up cam- retail stores have produced
gain more white collar more satisfactory results than
Negroes. with banks.

by the successful Alderman William L. Clay
ations by East St. Louis (Dem.), Twenty-sixth ward, a
roups, the St. Louis member of CORE, said yester-
f CORE has voted to day that the city's 16 largest
ct action, including sit- banks employ 269 Negroes in a
e-in demonstrations, at total work force of 5160. Of the
ess establishment main- 269, he said, 234 are in such
actial barriers to em- service jobs as custodians,
maids, elevator operators and
messengers.

B. Curtis, chairman of Only two Negroes work in su-
chapter, said separate pervisory positions, one as the
were scheduled with supervisor of a janitorial crew,
atives of some down- and only two Negroes work as
ks starting tomorrow tellers, Clay said.
officials "exactly how Clay said Negroes are not
groes we want hired hired in sufficient numbers even
ely." at banks in Negro residential
some banks have re- areas where Negroes are the
employ "a fair share" major depositors.
clerks, bookkeepers "The record seems to indicate
s, Curtis said, "it ap- that the banking industry of St.
ely" CORE eventually Louis has callously disregarded
ort to demonstrations the employment rights of the
f the banks."

aid CORE's campaign TURN TO PAGE 18, COLUMN 2

Negro Jobs

FROM PAGE ONE

Negro community," Clay asserted.

Questions Not Answered

He said he obtained his statistical information despite the refusal of the 16 banks to respond to his questionnaires asking for a breakdown on the number of Negroes employed.

Many business leaders have ignored similar information-seeking requests from CORE, saying they prefer to work instead, through the newly-created Mayor's Commission on Equal Employment Opportunity.

Aloys P. Kaufmann, president of the Metropolitan Chamber of Commerce, said the chamber was encouraging the business community to work with the commission, a 20-member group of business, labor and Negro leaders, in improving economic opportunities for Negroes.

A commission member said he feared CORE's pressure campaign would alienate those industrial and business leaders with whom the commission is working to achieve permanent improvements in the Negro employment picture.

"Demanding jobs on a quota basis is not the means to attain long-range employment gains for Negroes," he said. "It will only irritate business leaders and make our task more difficult."

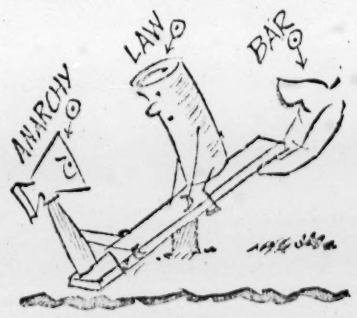
The spokesman, who asked to remain anonymous, said the com-

Bar Members Sharply Criticize Law Pro

To the Editor:

As members of the bar practicing law in the St. Louis area, we have carefully reviewed both the statement of John R. Barsanti, President of the Bar Association of Metropolitan St. Louis, and the recent letter of Jules Gerard, professor of constitutional law at Washington University School of Law, published on the subject of the demonstrations at the home of Judge Michael Scott.

We feel that the Washington University School of Law should be justly proud that it affords sufficient academic freedom so that its professors



can voice such opinions on this or any other subject.

Yet, we also feel that the Washington University School of Law should be equally embarrassed that any professor who would voice the particular sentiments expressed by Professor Gerard is a member of its faculty.

The issue raised by Mr. Barsanti is one of respect for the rule of law and rejection of the rule of the mob. It has nothing to do with the "facts" of these particular contempt cases. The legality and propriety of Judge Scott's decisions have been reviewed carefully by the highest state and federal courts.

The principles involved in the personal harassment of the judge, which Mr. Gerard not only condones but applauds, are the same that would apply should a failing student and his friends repeatedly harass an offending professor; or, if a large corporation mounted a vendetta against a judge who ruled against it in an anti-trust case.

A professor of constitutional law should be able to distinguish between the right to dissent and anarchy. He should have sufficient stability to prevent his personal, emotional involvement with causes or aims from clouding his perception of the legal principles involved.

We quite frankly find it somewhat disturbing that a man with the shallow conception of the rule of law expressed by Professor Gerard should occupy a position allowing him to mold the minds, ideals, and legal concepts of those who will soon be expected to serve as officers of the court and guardians of the law.

HAROLD A. THOMAS JR.
EDGAR T. FARMER
WALTER R. MAYNE
THOMAS ROWE SCHWARZ
JAMES A. STEMMLER
EDWARD E. MURPHY JR.
ALPHONSO H. VOORHEES

ROBERT B. CURTIS
ATTORNEY AT LAW
2847 UNION BLVD.
ST. LOUIS, MISSOURI, 63115
—
CO 1-0138

August 6, 1967

Mr. Carl Rachlin
Legal Director
Scholarship Education and Defense Fund for Racial Equality
150 Nassau Street
New York, NY 10038

Dear Carl:

Sent under separate cover
~~Enclosed~~ you will find a copy of a motion to disbar and my motion to dismiss with suggestions. The substance of the disbarment action is a criminal contempt of court for violation of an injunction against interfering with business at a St. Louis bank when CORE was attempting to obtain jobs for Negroes in 1963.

I believe that this is the first case in the country of attempted disbarment for participating in Civil Rights activities. The criminal contempt cases involved 19 persons (including three lawyers) and were appealed all the way to the Supreme Court but to no avail. The reported decisions in this case can be found under the following case names and citations: Curtis v. Tozer, 374 SW2d 557; In re Curtis' Petition, 240 F Supp 475; Curtis v. Boeger (reported sub nom Ford v. Boeger) 362 F2d 999; and cert den Curtis v. Boeger, 17 Led 2d 787. Unfortunately, the facts as reported in these opinions are incorrect and for the most part are not supported by any evidence in the record. Therefore, I have enclosed my answer to an equally incorrect report on this matter by the St. Louis Civil Liberties Committee.

I would very much appreciate your encouraging SEDFRE and the Lawyers Constitutional Defense Committee of the ACLU to file an amicus brief in my behalf and I would appreciate any suggestions that might improve my memorandum in support of motion to dismiss. The case is set on the Missouri Supreme Court docket for October 10, 1967. We have requested oral argument.

Kindest regards,

Robert

ROBERT B. CURTIS

P.S. Sorry I missed you at the Convention this year but I was broke and couldn't afford it.

THE FOLLOWING PAGES ARE THE BEST

AVAILABLE.

LAWYERS CONSTITUTIONAL DEFENSE COMMITTEE
OF THE AMERICAN CIVIL LIBERTIES UNION
156 FIFTH AVENUE, NEW YORK, N.Y. 10010
(212) YUKON 6-7860

August 14, 1967

Robert H. Curtis, Esq.
2647 Union Boulevard
St. Louis, Missouri 63115

Dear Mr. Curtis:

The papers relating to the pending disbarment proceedings against you arrived only this morning.

I should like to make the following suggestion: The Lawyers Constitutional Defense Committee, as you may know, is concerned almost exclusively with civil rights legal matters in the Deep South. Our close association with the American Civil Liberties Union, in any case, would make it highly problematic whether it would be proper for us to go to court when the St. Louis Civil Liberties Committee is already in the case in some posture.

I think it would be both more proper and more useful to argue the matter before the Supreme Court of Missouri. If you do not prevail there, I would urge you to contact promptly both me and Melvin L. Wulf, the legal director of the American Civil Liberties Union (at the same address). I would believe that you would then promptly and affirmatively consider giving you whatever help we can.

Unless you want the material back that you sent us, I'll simply hold on to it so that, in the event you might well have to come before the U.S. Supreme Court, we'll have it in our file.

I might say that we should certainly consider strongly the relative strategic advantages of both procedural and substantive questions if and when we would associate ourselves with your defense. We shall not necessarily be bound by the posture of the St. Louis Civil Liberties Committee.

We wish you every luck in the other proceedings.

Sincerely yours,

Harry Schwartzwald
Executive Director

HSchw

Contributions to the Lawyers Constitutional Defense Committee are tax-deductible

August 16, 1967

Mr. Henry Schwarzschild
Executive Director
Lawyers Constitutional Defense Committee
156 Fifth Avenue
New York, NY 10010

Dear Mr. Sebwaschild:

I was disappointed at receiveing your letter of August 14, indicating thata you don't think it appropriate to give immediate assistance in the disbarment case pending against me. I am sure you must understand that I need amicus support now —not at some later date when my law practice is ruined and blown away.

Frankly, I don't understand your desire to wait on this matter for an adverse ruling by the Missouri Supreme Court. It has come to my attention that LCDC has expressed an interest in Arthur Kinoy v. District of Columbia which is presently pending before the lower federal courts. Why couldn't this be done in my case when it can do some good-not after it is too later and when a ruling might only by of interest to legal sdolars?

As for local support you probably already know that the St. Louis Civil Liberties Committee is closely tied in with some of the most conservative forces in the St. Louis area. I can expect no material support from them in this matter. They are opposed to fair housing and almost never take a forthright stand on any issue affecting the rights of the common man. Naturally this is not typical of most civil liberties committees, but I think it important for you to understand why I need outside support for my legal position.

I would very much appreciate it if you would reconsider your position and make arrangements to file a brief in support of my position. I have asked several other groups to participate so that it will appear that I am not all alone.

Sincerely yours,

cc: Melvin Wulf
Carl Rachlin

ROBERT B. CURTIS

L I B E R T I E S

March, 1964

COMMITTEE'S STUDY OF CIVIL RIGHTS

in Jefferson Bank Racial Demonstrations

In July, 1963, the St. Louis affiliate of Congress of Racial Equality (CORE) demanded that within two weeks four Negroes be employed as clericals by the Jefferson Bank and Trust Company. The bank was founded in 1892 at Jefferson and Franklin, St. Louis, and in 1956 moved to its new building at Jefferson and Washington.

The bank at various times had employed Negro clerical employees and for several years had employed a Negro teller. The quota and time limit, however, were rejected, as was a later, more moderate hiring proposal. CORE representatives threatened "direct action" explained as physical interference with bank operations and the bank sought and obtained a temporary restraining order from Judge Michael Scott of the Circuit Court of the City of St. Louis.

Blocking of bank entrances, lie-ins in front of tellers' cages and other obstruction by CORE demonstrators occurred August 30, October 4 and October 7 in violation of the court order. Police arrests for trespass and other offenses by demonstrators were made in the following four days.

Evidence of violation of the restraining order was presented to Judge Scott, and 19 persons in three groups were fined and sentenced to jail. Four persons were released by the St. Louis Court of Appeals; the fines and sentences of others ranged from $500 to $1000 and 60 days to a year. The restraining order was made permanent by another judge in December.

At the time of the appeal action on the contempt sentences, officers of our Committee asked for a study to determine if a brief amicus curiae should be filed. With Attorney Benjamin Roth the principal author a report in the negative was presented to the executive board in February and adopted. It is published below substantially in full.

A. THE RELEVANT QUESTIONS

It quickly became apparent there were five principal questions.

1. Was the Jefferson Bank hiring a proper number of Negroes?

2. If not, should people be sentenced to jail for violating a court order in an effort to force such employment?

3. Did the court order violate rights of citizens to protest any discriminatory hiring practices of the bank?

4. Were the 19 accorded due process of law in their trial and conviction and was there substantial evidence of their guilt?

5. Assuming guilt, were the sentences unduly severe?

Only the last three questions were studied. Working with other lawyers, I examined the transcript of the Circuit Court proceedings concerning the first two groups tried. There was a great delay in obtaining this transcript, and we did not have time to obtain the third transcript, and study it. I don't believe there were any issues concerning the last group which did not arise in the first two. I concluded and advised the St. Louis Civil Liberties Committee officers as follows:

1. The restraining order of August 30, 1963, was issued after officers of CORE had planned on physical interference with the bank's business in addition to peaceful picketing.

(Continued on next page)

2. The restraining order forbade only physical interference. It did not forbid any lawful acts by CORE members, such as picketing.

3. The restraining order, like all such orders, applied to CORE members and anyone cooperating with them in violation of the order.

B. PICKETING RIGHTS NOT INVOLVED

4. On August 30, officers of CORE and others went beyond "non-violent civil disobedience." They did not seek peacefully to enjoy rights withheld from them because of their color. Instead they purposefully used force and violence to interfere with the business of their target, the bank, in an effort to cause damage to the bank. The demonstrators had no constitutional right to lie on the floor of the bank, to forcibly block the doors of the bank, to dance and sing in the bank, or to bodily block access to the tellers' windows. These acts were in contravention of the restraining order. They had a right to picket peacefully, and this was never questioned.

5. When there is a complaint that a restraining order or injunction has been violated it is proper for the court to take the alleged violators into custody but the court should as soon as possible hold a hearing to see whether the alleged violators should be released outright, released on bond, or continue to be held pending a full hearing on the alleged violation. Holding such prompt hearings quickly is a protection of rights not a violation.

C. FIELD OF COMMITTEE ACTIVITY

6. The St. Louis Civil Liberties Committee appears in court in two types of situations:

a. If the Committee believes that an accused person cannot obtain counsel and is thus deprived of due process, we will attempt to supply counsel. This was not the case in the CORE matter. All defendants were represented on appeal, and we were not requested to represent anyone.

b. If the Committee believes that defendants have been deprived of a fair trial or other elements of due process, we will attempt to obtain permission to file a brief amicus curiae, confined to these civil liberties points.

We do not come to the assistance on appeal of persons who claim they were convicted though innocent against the evidence, or on the basis of wrongfully admitted evidence, or on the basis of allegedly perjured evidence.

There are hundreds of appeals from criminal convictions in Missouri each year, and in each of them the defendant says he shouldn't have been convicted. The Committee recognizes that even at a fair trial with a competent lawyer a wrongful conviction may occur. It is the function of appeal courts to correct as many of these situations as possible. The function of the Committee is to see that the fair trial, adequate representation, and right of appeal exist. If is not the function of the Committee to participate in appeals except as stated above.

D. COMPLAINTS ABOUT CONTEMPT ACTION

7. In the CORE-Jefferson Bank situation there were many allegations of improperly received evidence, and allegations that some or all of the elements of contempt remained unproved against some or all of the defendants.

These are the sorts of complaints common to most appeals. The attorneys representing the defendants were competent to brief these matters for the appeal court. They were also competent to brief the technical point (which I considered and consider completely baseless) that this was the sort of "labor dispute" which the Taft-Hartley Law puts solely under Federal jurisdiction. In any event, these are not issues of civil liberties.

(Continued on next page)

E. BRIEF UNWISE AS TO FOUR LATER RELEASED

8. The other lawyers who read the transcript believed that there was no substantial evidence that the four defendants who were ultimately freed by the St. Louis Court of Appeals were guilty. We did not feel that a brief to this effect should be filed because:

a. The defendants' attorneys were preparing a chart showing what each witness said about each defendant, which would make the point dramatically clear to the Court, and

b. By briefing the point concerning four defendants we would imply that we did not think it applied to the remaining defendants, and this might prejudice their cause.

F. BANK'S PRESENTATION OF EVIDENCE

9. A great deal has been said about "criminal" and "civil" contempt, and whether these proceedings were one or the other, and if so, with what effect. Actually the Missouri statutes do not use these words. They do cover two kinds of contempt, one being an offense to the court itself such as calling the judge a thief, and the other being the violation of a privately obtained court order. There are somewhat different procedures provided. Normally the attorney for the wronged litigant prosecutes the latter kind of contempt. In the Jefferson Bank case it was the bank which had obtained the court order, and normally its attorney would conduct contempt proceedings against violators of the order. The fact that he did so does not appear to me a violation of civil liberties, no matter which type procedure was followed.

G. OPPORTUNITY TO PRESENT EVIDENCE

10. As a result, the only possible "due process" issue I could see was the question of adequate notice and time to prepare for trial.

The trial of the first group got off to a confusing start. However, as the matter worked out the defendants were given a generous amount of time to prepare for trial. The second group demonstrated and were arrested late on a Friday afternoon. They were given their preliminary hearing promptly, and released on bond to appear for trial Monday morning. Trial was commenced on Monday.

I cannot say that this gave so little time as to constitute a violation of the right to due process. The issue was simple, did or did not each defendant engage in forceful action in the bank, and did they do so knowing such violence had been forbidden by the court order? No defendant claimed an alibi. All admitted engaging in the activities in the bank.

H. SEVERITY OF SENTENCES

11. I had a feeling shared by many others, that the sentences Judge Scott imposed were unduly severe. Under the procedure adopted by the defendants for review of their cases, that is by habeas corpus, the appeal court could only consider whether the sentences were so severe as to constitute unconstitutional "cruel and unusual punishment."

The other lawyers and I concluded that we could not successfully argue that a one year's sentence for a willful violation of a court's order, plus incitement of others to do the same, was "cruel and unusual".

I. JURY TRIAL NOT REQUIRED

12. The defendants did not request a jury in their trials. We could not, therefore, complain of violation of the Missouri Constitutional guarantee "in criminal prosecutions of a speedy public trial by an impartial jury of the county." It should be noted that this is different from the provision of the United States Constitution, which appears

(Continued on the next page)

in the Missouri Constitution in addition to the above, that "The right of trial by jury as heretofore enjoyed shall remain inviolate."

Here it is held that there was "heretofore" no jury in contempt cases, so there isn't now. The same argument could not be made under the impartial jury" clause. Thus the rights in Missouri may not be ruled by the United States Supreme Court decision in Govenor Barnett's contempt case.

The following statement is intended to be a refutation of the report by the St. Louis Civil Liberties Committee (ACLU), published in Liberties, March 1964 and entitled "Committee's Study of Civil Rights in Jefferson Bank Racial Demonstrations." The author herein contends that the ACLU report is marked not only by gross errors in fact but glaring omissions of relevant subject matter that tends to give the reader a false impression that all 19 defendants received a fair and impartial trial and that they were in reality guilty of the charges against them.

ACLU REPORT

"In July, 1963, the St. Louis affiliate of Congress of Racial Equality (CORE) demanded that within two weeks four Negroes be employed as clericals by the Jefferson Bank and Trust Company.....The bank at various times had employed Negro elerical employees and for several years had employed a Negro teller."

REPLY

Why not mention the state of Negro clerical employees in major banks throughout the city i.e. 35 Negroes of 5,000 in a city that is 30% Negro, that after the bank moved to Washington and Jefferson in 1956 all Negro clerical employees except one were removed, that Jefferson Bank is the chief depository for city, Board of Education and Housing Authority Funds, that CORE had carried on negotiations with Jefferson Bank for two years prior to the demand without results, that the unemployment figures among Negroes was 2½ times as high as that for Caucasians?

ACLU REPORT

"CORE representatives threatened "direct action' explained as physical interference with bank operations."

REPLY

Who made this explanation? When? Where? This statement has not been substantiated and is totally false.

ACLU REPORT

"Blocking of bank entrances, lie-ins in front of tellers' cages and other obstruction by CORE demonstrators occurred August 30, October 4, and October 7 in violation of court order."

REPLY

The statement regarding August 30, is true. On the 4th of October blocking of bank entrances occurred but not by CORE demonstrators. On the 7th of October there was no blocking of bank entrances, lie-ins infront of tellers' cages. The words "other obstructions" is ambigucus. However,several persons did attempt to make change which the bank agreed to do for 25 cents. Strangely the report fails to mention that of those attached for violating the injunction on August 30, only one participated in activities inside the bank.

ACLU REPORT

"Evidence of violation of the restraining order was presented to Judge Scott, and 19 persons in three groups were fined and sentenced to jail."

(Continued on next page)

REPLY

The report failed to mention that there was no testimony by any witness who stated that he was incited or encouraged by any of the first nine defendants to violate the injunction and that in point of fact several witnesses stated that these persons counseled obedience of the restraining order. The report also omits the incident of a sheriff's deputy pushing three small children to the ground and the fact that no demonstrator entered the bank until after this occurrence.

ACLU REPORT A THE RELEVANT QUESTIONS

"1. The restraining order of August 30, 1963 was issued after officers of CORE had planned on physical interference with the bank's business in addition to peaceful picketing."

REPLY

Which officers of CORE and when were these plans made? Infact plans were made at a stratedgy meeting to picket and seven persons volunteered to stand infront of one of the bank's doors. This action was voted on by 35 persons who attended the CORE meeting and not by officers of CORE. The report never mentioned the fact that both bank doors were not obstructed at the same time.

ACLU REPORT A THE RELEVANT QUESTIONS

"3. The restraining order, like all such orders, applied to CORE members and anyone cooperating with them in violation of the order."

REPLY

How is this conclusion reached when the order omits "and anyone cooperating with them."

ACLU REPORT B PICKETING RIGHTS NOT INVOLVED

"4. ....Instead they purposefully used force and violence to interfere with the business of their target the bank, in an effort to cause damage to the bank."

What violence? How many persons were killed or assaulted by CORE members at any of the three demonstrations? The simple fact is that there was no violence purpertrated by CORE, nor was there property damage to the bank--not even a broken window. Unless one views trespassing, singing, or sitting on the bank's floor as violent acts, the statement is totally false. Also if these facts were true and with ample supply of police both inside and outside why were no arrests made for assault etc? The record will clearly show that CORE is an organization based on direct non-violent action and that not one member of St. Louis CORE has ever been arrested for violent conduct during the course of a CORE activity.

ACLU REPORT F BANK'S PRESENTATION

"9. .....In the Jefferson Bank case it was the bank which had obtained the court order, and normally its attorney would conduct contempt proceedings against violators of the order. The fact that he did so does not appear to me a violation of civil liberties, no matter which type of procedure was followed."

REPLY

The report does not mention that Millsap is the son-in-law of the bank's president. Nor does it mention that his position as prosecutor could be questioned because as attorney for the bank he had a financial interest in the outcome of the cases. Furthermore, in spite of the

(Continued on the next page)

Cannons of Ethics regulating the conduct of Missouri lawyers, Wayne Millsap issued numerous denunciations of CORE through the media of radio, television and the press. He sought to accomplish this objective anonymously with a large paid advertisement entitled "Facts on Jefferson Bank and Fair Employment." This ad was paid for by Jefferson Bank and printed while the trial of petitioners in Ford et al was in progress. In addition the executive committee of the St. Louis Bar Association, while Millsap was a member, voted to issue a press release denouncing petitioners, who had just been sentenced and were seeking release on writs of habeas corpus. This unprecedented action of the St. Louis Bar served to place the entire weight of the Bar against them. No question was raised as to how John Montrey got into the third case or who paid for his services.

ACLU REPORT G OPPORTUNITY TO PRESENT EVIDENCE

"10. ....The trial of the first group got off to a confusing start. However, as the matter worked out the defendants were given a generous amount of time to prepare for trial."

REPLY

The word "confusing" is hardly a descriptive term. Judge Scott held those who did not post $10,000 bond in jail over the Labor Day weekend, without a hearing. He sent the sheriff out on Saturday night between 10:30 p.m. and 1:00 a.m. after being awakened by sheriff's men pounding at their doors. On Tuesday morning September 3, Judge Scott ordered the trial to commence before the defendants had had an opportunity to consult with counsel. He later granted only 30 minutes for this purpose. The case was continued because the St. Louis Court of Appeals suggested that it be done and for no other reason. The report does not mention or explain, why defendants were held in lieu of the fantastic sum of $10,000 each. Nor does it inform the reader that persons charged with felonies including 2nd degree murder are frequently released on $5,000 bond or less. Also no explanation is given as to why Judge Scott was so desirous of getting a quick conviction, that he allotted the defendants only 30 minutes to prepare for trial? These questions among others remain unanswered.

Defendants were served with "official" notices of charges on the 19th of September 1963. The notices were served on defendants only four full days before the trial began, two of these days being Saturday and Sunday. Wayne Millsap would not divulge the names of the witnesses he intended to use in the trial but he filed answers to interrogatories listing about 100 possible witnesses to the alleged contempt. They included all of the bank's employees, all sheriff's deputies, all newsmen and all but a few policemen at the scene of the demonstration. In addition Millsap waited until the 18th of September to file an amended answer to interrogatories listing 14 additional witnesses. These names were not received by defense counsel until the 20th of September. The next two days were Saturday and Sunday and trial commenced on Monday the 23rd. There was no time to take depositions of these witnesses. Yet the ACLU report states that a "generous" amount of time was given to prepare for trial. The report does not even mention the fact that defendants gave there depositions on the 8th of September under the assumption that they were being tried for civil contempt, and that Millsap was not appointed "special prosecutor" until September 18th after tricking defendants into waiving their rights not to testify under the 5th amendment, by taking their depositions earlier.

ACLU REPORT G OPPORTUNITY TO PRESENT EVIDENCE

"10. .....The second group demonstrated and were arrested late on Friday afternoon. They were given their preliminary hearing promptly,

(Continued on next page)

and released on bond to appear for trial Monday. I cannot say that this gave so little time as to constitute a violation of the right to due process. The issue was simple, did or did not each defendant engage in forceful action in the bank and did they do so knowing such violence had been forbidden by court order? No defendant claimed alibi. All admitted engaging in the activities in the bank."

REPLY

The report states that they were arrested on Friday the 4th of October and their trial commenced on Monday the 7th of October. This statement is clearly in error. The trial began on Friday night about 9:00 p.m. Defendants had no longer than 45 minutes to prepare for trial and confer with counsel who "volunteered their services." The trial was adjourned at 3:00 a.m. Saturday morning until Monday a.m. However even had the trial commenced on Monday morning defendants would have still been hard pressed to have found counsel of their own choosing on Saturday or Sunday when the courts and most law offices are closed. It should also be noted that two of these defendants received sentences of one year in jail and $500 fine after getting only 30 minutes to prepare for trial. More time than that is given for a traffic violation. Yet the ACLU report found no violation of due process here.

In addition the report states that "the issue was simple" did they commit the acts knowing that "such violence" has been forbidden by court order? This is a suprising statement since the same issues are present in all criminal trials, e.g. Did x murder Y? or Did X rob Y? In addition under generally applicable criminal statutes, ignorance of the law is no excuse, so the requirement that contemnors have knowledge of an injunction presents an additional issue here. It appears then, that the issues in these contempt cases were no simpler than issues in other cases and possibly they were a great deal more complex. The report states again that this second group acted in a violent manner, without stating how many persons were injured and how much property damage was done or why the defendants were arrested by the St. Louis Police on charges of trespassing and peace disturbance rather than felonious assault etc? In point of fact there was no violence. Defendants sat or stood in the door way, locked arms and sang freedom songs. They were allowed to remain in the bank for at least 30 minutes before the police asked them to depart and when they refused they were carried away under arrest to the 4th district station.

The report states correctly that "all admitted engaging in the activities in the bank", however it fails to say that all denied having any knowledge of the injunction, that they were bound by it and they further denied membership in the class enjoined. Their testimony on these issues was uncontradicted by any other evidence. The report also omits any mention of the fact that the second group was tried for civil contempt and sentenced for criminal contempt. The right to know what one is charged with is elementary due process.

ACLU REPORT H SEVERITY OF SENTENCE

"11. ...The other lawyers and I concluded that we could not successfully argue that one year sentences for a willful violation of a courts order, plus incitement of others to do the same was "cruel and unusual!"

REPLY

Those who were sentenced to one year were not charged with or found guilty of "incitement of others" to violate the court order. Only those who were tried for contempt as a result of the August 30, demonstration were charged with incitement of others.

As for cruel and unusual punishment is seems to me that this would have been an excellent opportunity to compare sentences in the CORE cases with In re Debs 15 S Ct 901 where Eugene Debs received a six month sentence after conviction for violation of an injunction against

(Continued on the next page)

the Pullman strike (1894) in which numerous persons were killed and many railroad cars burned. Debs was struggling in behalf of the interest of the white working man. He was a party to the injunction suit and his strike which caused delay in distribution and transportation of the United States Mail etc. was of national proportions. In this case CORE members were convicted for contempt while struggling to gain jobs for Negroes. There was no violence, no one was injured (except three small children who were pushed to the ground by a deputy sheriff, receiving only bruises) and no property damage was done to the bank. Yet James Peake (a man consigned to a wheel chair for the rest of his life) was sentenced to one year in a crowded jail despite the fact that he is totally helpless. He was alleged to have violated an injunction to which he was not a party, by refusing to leave Jefferson Bank when asked. This disparity can only be looked upon as a dispicable outcropping of racism in St. Louis.

Nowhere in the entire report is there any mention of adverse publicity and its possible or probable effect on the trials. The fact that Jefferson Bank published during the trials a large paid advertisement denouncing CORE seems of little importance to the author. Also a series of articles in the Globe Democrat suggesting communist infiltration of CORE, adverse public statements by Govenor Dalton, Mayor Tucker, Alderman Gunn, State Senators McNeal and Kinney and press statements and television interviews by Millsap have not been mentioned.

The question "Do the present laws relating to criminal contempt, provide adequate protection and due process for a person charged with violation of a court order?", was briefed by the ACLU in United States v. Ross Barnett. This issue was not even considered in the ACLU report on the CORE cases, eventhough the only review available was by the limited means of habeas corpus which normally goes only to questions of procedure and jurisdiction. Therefore,the larger question involving civil liberties can and should be put in the following manner: When one judge can issue an ex parte injunction, attach for contempt, appoint a prosecutor or act as the prosecutor, receive the evidence without a jury, decide questions of law and fact, impose an unlimited sentence, without bail, which is final and not subject to appeal procedures, is this not too much power for any man to possess in a free society?

MSS
GENERR

Daughtry, Herman vs City of New York, June, 1962 – Sept, 1965

Box 36
Folder 8

State Historical Society of Wisconsin

Please Retain Original Order

DAUGHTRY

er Date: June 26, 1962

iled:

62 1458059

STATE OF NEW YORK

192—Statement as to Retainer—Sliding S of Compensation; App. Div., July. 1960.

Robbins Stationery Co., Inc., 25 Warren Street, New

A ROBBINS PRODUCT

For office use:

RETAINER STATEMENT

TO THE JUDICIAL CONFERENCE
OF THE STATE OF NEW YORK
Post Office Box 2016
New York 8, N. Y.

1. Date of agreement as to Retainer.
   June 26, 1962

2. Terms of Compensation.

   (A) Fifty per cent. on the first one thousand dollars of the sum recovered;

   (B) Forty per cent. on the next two thousand dollars of the sum recovered;

   (C) Thirty-five per cent. on the next twenty-two thousand dollars of the sum recovered;

   (D) Twenty-five per cent. on any amount over twenty-five thousand dollars of the sum recovered;

   Provided, that in the event extraordinary services are required the attorney may apply to the Court f compensation.

3. Name and home address of client HERMAN DAUGHTRY, 522 McDonough St., Brook

4. *If engaged by an attorney, name and office address of retaining attorney

5. If claim for personal injuries, wrongful death or property damage, date and place of occurrence April
   in the vicinity of McDonough Street, Bklyn, and in the 81 Poli

6. If a condemnation or change of grade proceeding:

   (a) Title and description

   (b) Date proceeding was commenced

   (c) Number or other designation of the parcels affected

7. Name, address, occupation and relationship of person referring the client Marie Mendez, 85 N
   Brooklyn, N.Y., employed by client of this office.

Dated: NEW YORK, N. Y., 9th day of July

Yours, etc.

Carl Ro

Signature of Attorney

Print or Type

VLADECK & ELIAS

Attorney

280 Broadway

Office and P. O. Address

1st Dist. 1st Dept. New Yor

* Set forth particulars as to the fee arrangement, the type of services to be rendered in the matter, the code number assigned to th retainer filed by the retaining attorney and the date when said statement of retainer was filed.

309—Petition, Consent and Order for Appointment
Guardian Ad Litem (infant under [illegible]ove 14 yrs.)

IULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
71[illegible]OADWAY AND 1 RECTOR ST., NEW YORK

At a Special Term, Part 2 of the
SUPREME COURT, KINGS COUNTY

held in the Courthouse at Civic Centre
Montague St, Brklyn, N.Y.
on the 19 day of JULY 19 62

PRESENT

Hon. Daniel F. Connolly
Justice

In the Matter of the Application of

HERMAN DAUGHTRY, JR.

For the appointment of a Guardian ad Litem for said

HERMAN DAUGHTRY, JR.

An Infant over the Age of Fourteen Years.

On reading and filing the duly verified petition of HERMAN DAUGHTRY, JR.
for the appointment of a Guardian ad litem for the above named infant and the consent of
JANE DAUGHTRY
JANE DAUGHTRY
duly acknowledged, and proof by affidavit of said
that she is a competent and responsible person,

Now on Motion of VLADECK & ELIAS, attorneys
for said petitioner HERMAN DAUGHTRY, JR.

It is Ordered that said JANE DAUGHTRY be, and she hereby
is appointed the Guardian ad litem of the infant HERMAN DAUGHTRY, JR.
and authorized and directed to prosecute on behalf of said infant an action against the said
City of New York
to recover damages for personal injuries sustained by said infant.

Granted
Jul. 19, 1962
Joseph A. Whitty
Clerk

Enter
D.J.C.
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK

In the Matter of the Application of

HERMAN DAUGHTRY, JR.

For the appointment of a Guardian ad Litem for

HERMAN DAUGHTRY, JR.

An Infant UNDER the Age of Fourteen Years.

The undersigned, petitioner, respectfully shows to this Court:

1. That your petitioner is HERMAN DAUGHTRY, JR. an infant UNDER the age of fourteen years, to wit, the age of 19 years and said infant resides with his mother, JANE DAUGHTRY, and his wife (petitioner) at 522 McDonough Street, Brooklyn, New York.

2. That no General or Testamentary Guardian has been appointed for said infant pursuant to law.

3. That heretofore and on or about the 28th day of April 1962 the said infant sustained personal injuries consisting of serious bruises, contusions, concussion and shock

through the carelessness and negligence of the and assault and battery of the City of New York by various of its representatives, agents and employees

in the vicinity of McDonough Street and Patchen Avenue and at the 81st Police Precinct, Brooklyn, New York

4. That said JANE DAUGHTRY who resides at 522 McDonough Street, Brooklyn, New York is a competent and responsible person to become the Guardian ad litem of said infant as will more particularly appear by the affidavit hereto annexed.

Wherefore, your petitioner prays that JANE DAUGHTRY be appointed the Guardian ad litem of said infant to bring and prosecute an action on the above claim

That no order or previous application for such appointment has been made.

Dated, July 1962

.....
Petitioner.

State of New York,
County of } ss.:

being duly sworn, says: That he has (heard) read the foregoing petition; that the same is true of h own knowledge, except as to those matters stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Sworn to before me this
day of 19 }

.....

CONSENT OF PROPOSED GUARDIAN

I Hereby Consent to become the Guardian ad litem of HERMAN DAUGHTRY, JR. to bring the above mentioned action and to be responsible for costs.

.....

JANE DAUGHTRY

State of New York,
County of } ss.:

On this day of July 19 62, before me personally appeared JANE DAUGHTRY to me known and known to me to be the individual described in and who executed the foregoing consent and she duly acknowledged to me that she executed the same.

.....

AFFIDAVIT OF PROPOSED GUARDIAN

State of New York,
County of } ss.:

JANE DAUGHTRY being duly sworn, says: That she resides at No. 522 McDonough Street, Brooklyn, New York That she is the mother of the above named infant, and is fully competent to understand and protect the rights of the infant and has no interest adverse to that of said infant and is not connected in business with the attorney or counsel of the adverse parties or any of them.

That she is of sufficient financial ability to answer to the said infant for any damages which may be sustained by her negligence or misconduct in the prosecution of said action, and is worth at least the sum of Two Hundred and Fifty ($250) Dollars, consisting of cash and household effects above all her debts and liabilities and besides property exempt by law from execution.

Sworn to before me this
day of 19 } .....

SUPREME Court

County of KINGS

IN THE MATTER OF
THE APPLICATION OF

HERMAN DAUGHTRY, JR.

For the Appointment of a
Guardian ad Litem for

HERMAN DAUGHTRY, JR.

An Infant over *the Age of 14 Years.*

Petition, Consent and Order for Appointing Guardian Ad Litem

VLADECK & ELIAS

Attorneys for Petitioner
Office and Post Office Address

Lewis

COMPTROLLER'S OFFICE
BOROUGH OF MANHATTAN

October 22, 1962.

C-131-466
Tort Div. No 89753
Compt. No T 178442

Claimant: HERMAN DAUGHTRY, infant by:
JANE DAUGHTRY, Guardian ad Litem.

Attorney: VIADECK & ELIAS, Esq.
280 Broadway
New York 7, N. Y.

s/(H.T.)

by: SHELDON ~~ENGLEHARD~~ ENGELHARD, Esq.
of Counsel.

Telephone: WO 2-5105

For the Comptroller: JOSEPH RIZZUTO, Esq.

H E R M A N D A U G H T R Y, being first duly sworn, testified as follows:

BY MR RIZZUTO:

s/H AD

Q What is your name? A Herman Daughtry.

Q Where do you live? A 522 McDonald Street Dennigh
in Brooklyn.

Q How long have you been living at that address? A 18 years or so.

Q How old are you? A 19.

Q Are you married? A Yes, I am.

Q What is your wife's name? A Brenda.

Q Do you have any children? A Yes, I have two.

s/H AD

Q What are their names and ages? A ~~Vita~~ Veda

Q Age? A Two and Herman Jr., one.

Q With whom do you live in your present address? A With my grandparents.

Q With your wife and children? A Wife and children.

On April 28, 1962, by whom were you employed at that time? Who did you work for on April 28, 1962? A Bertwood

Products.

Q The address? A 303 Fifth Avenue.

Q Manhattan? A Manhattan.

Q What type of work do you do there? A I am a Shipping Clerk.

Q How much did you earn at that time? A $60 per week.

Q How long had you been working for this outfit? A Before the accident?

Q Yes. A Two months.

Q On April 28, 1962, a certain incident took place; is that correct? A Yes.

Q About what time - what time did it start? A About nine p.m.

Q Where were you when the incident started? A In front of my friend's home.

8/1HD

Q Where is that? A 508 McDonald Street.

Q You were in a stoop or the sidewalk; where were you? A In front of the home. It has one stoop/.

Q Were you on the stoop? A Yes.

Q Standing, sitting? A Standing.

Q Were you on that stoop alone or with others? A With others.

Q How many others? A Three others besides myself.

Q Were they males? A Yes.

Q What are the names and addresses of these others? A Well, one name is Martin Beyer, 518 McDonald Street. Valentine Mathias, 516 McDonald, and Aaron McCullough, 568 McDonald Street.

3/1HD

Q Is that the fellow you lived in his house? A Yes.

Q What day of the week was it? A A saturday.

Q Where had you been prior to being on the stoop? A In the house.

Q In which house? A My house.

Q Had you been alone in your house? A I had been with my mother, my wife and children.

Q You weren't with any of these fellows? A No.

Q When did you meet these fellows? A On the way to the store.

Q You were on your way to the store? A Yes.

Q Where did you meet them? A In front of my friend's Aaron's house.

Q What were you doing there? A I stopped there, we go up to the store as I came down and I asked them to go to the store.

Q To what store were you going to? A To the butcher on Decatur and Reed.

Q What happened? A I don't know what you mean.

Q What took place, and then what happened? A They just came and Aaron said he can't go to the store because the wife wasn't home with the children, so at the time, the officer came over there.

Q How long had you been with these other men before the officer came? A About two or two and a half minutes.

Q Was this officer in uniform or plainclothes? A Uniform.

Q One officer? A Yes.

Q He came to the stoop there? A Yes.

Q What took place then? A He asked us to break it up.

Q Did you break it? A My friend Aaron, he came downstairs for some air, and there was nobody there with the children, so he came for air, and the officer walked away and this girl I knew she went to the store, and she was coming out of the store. I was walking with her around her way because she lives on the direction of the store --

Q You walked with her? A Yes, I walked with her.

A+AD

Q What is this girl's name and address? A Cynthia Richardson. I don't know the exact address.

Q Do you know what street she lives in? A Yes, on Decatur Street.

Q You were going where? A To the store.

Q You walked on the sidewalk? A On the sidewalk.

S/A+AD

Q On what street? A On Patchen ~~Xxxxx~~ Avenue coming from McDonald Street.

Q And, you were going to the store? A To

Decatur and Reed to the butcher store.

Q You were talking to this girl? A Yes, I didn't exactly get her into a conversation, I got to the corner, the arresting officer came, he came back that soon.

Q When you say the 'arresting officer', who is he? A Officer Matson.

Q Was he the same officer that had approached you while you were on the stoop? A Yes.

Q When you say 'arresting', did he arrest you at that time? A Yes, he did.

Q Why did he arrest you? A Well, at the moment he didn't arrest, he didn't say anything, but my charge is Disorderly Conduct and Assault.

Q When he approached you you were with this girl? A He told me to get up against the wall.

Q The wall of the building? A Yes.

Q Did he also arrest this girl? A No, he let the girl lose.

Q What do you mean 'he let her loose'? A I was holding her hand and talking to her and I let her hand --

Q When he told you to get against the wall, did you ask him why he asked you to do that? A Not at the moment.

Q A short time after that did you say anything to him? A Yes.

Q What did he say? A He said - nothing - to shut-up.

Q When you were against the wall, what did he do to you? A It happened, when I got against the wall my friend was on the stoop. I could show better with pictures. The stopp here and here --

Q Indicating. There are stores there? A No, this is the stoop and the store, one store.

Q In other words indicating with his fingers that the store was next to the building where his friend lives. A Yes.

Q What kind of a store was it? A A grocery store.

Q Go ahead. A Soon, I got against the wall, my friend was there and we were all against the wall.

Q Your friends were there? A Yes.

Q What connection does the grocery store have with the wall that you were against? A It's right next to it.

Q Were you against the window or the wall of the grocery store? A The window of the grocery store, yes.

Q And, you say you were there with three men that you mentioned before? A Yes.

Q How did they get there? A They were standing right there. When I was walking around the corner with the girl they wanted to see what I was doing and the policeman was there, and he told me to get against the wall and he told them to get against the wall.

Q What took place while you were against the wall? A My friend Aaron said that he had to go upstairs with the children, he told the officer before that there was nobody upstairs with the children, so he started to walk off and the officer pulled out his gun and he told him he wasn't going anywhere and he got my friend by the jacket and told him to "stay here", and my friend said: "There is nobody with the children, I have to get upstairs", and the officer said: "You are not going any so - so place" and held him by the jacket, and told him there was nothing to worry about, and he hit me and told me to shut my so-so-mouth.

Q Where did he hit you? A The officer hit me --

THE EXAMINER: Indicating the forehead over the right eye.

Q With what did he hit you? A The stick.

Q The night-stick? A Yes.

Q Then, what took place? A He hit me another time.

Q Where? A Over my head.

THE EXAMINER: Indicating the forehead.

THE WITNESS: All around my head. He only hit me on my head and then I staggered off, because he didn't hold me I staggered off to go home, and this is the store here. I was on this side of the store and I got around this side of the store and I fell out.

THE EXAMINER: Indicating that he went from one window to the other window.

A Then I fell down.

Q Was the police officer there when you started to walk from one window to the other window? A When I fell

around he was there and there were three police officers the

Q Were the other three men taken to the police station? A No.

Q When you fell, did the police officer come to you? A Yes.

Q The same one that had struck you? A Yes.

Q And, what did he do for you then? A I don't know exactly, I found myself in the police car.

Q Were you bleeding from any parts of your body? A I can't remember.

Q Were you alone in the police car or were you with the police offier? A Three police officers, my wife and my mother.

Q Do you know how your mother and wife got to the police car? A Not exactly, I don't.

Q Where were you taken in the police car? A To the precinct.

Q Which one? A 81 precinct.

Q Did your mother and wife also come to the precinct with you? A Yes.

Q What took place when you went to the precinct? A Well,you were sitting down, they took us in the back-room. My aunt, she got arrested at the time. When she came from the house, you see what happened - when I was on the ground all the people were around me watching. My other friend was on the ground and they picked people out of the crowd and took them, you see --

s/1417

Q You say 'they', who picked them? A The policemen jumped out of the car.

Q And, they picked your aunt? A Yes.

Q What is her name and address? A Henrietta Tallyver (phonetics).

s/1417

Q How is that spelled? A ~~T-o-l-l-i-v-e-r.~~ Tolliver

Q She was in the police station with you? A Yes.

Q And, your mother was there? A Yes.

Q And, your wife? A Yes.

Q Was your mother under arrest? A No.

Q Was your wife under arrest? A No.

Q Anyone else with you was under arrest at the time? A Just my aunt and Morton Buyers. (phonetics).

Q When you were in the police car were you told by the police officers that you were under arrest? A I gathered at the time I was under arrest.

Q When you reached the police station were you told by anyone that you were under arrest? A Yes, they were writing out reports.

Q And, what did they say you had been arrested for? A They didn't say.

Q How long did you they keep you at the police station? A I can't remember the time exactly. My mind is blank.

Q Were you while at the police station, at all times with your aunt? A Yes.

Q Where were you taken from that police stat on? A We were taken to Night Court.

Q Your aunt and yourself? A Yes.

Q And, did your mother and wife accompany you to the Night Court? A Yes, and the other people that came to the precinct from around the neighborhood.

Q When you say 'other people' whom are you referring to? A My friends, mother of Morton Bayer, my friend, not the one that lived at the apartment, he didn't come to the precinct because he had to take care of the children, Valentine Mathias, quite a bit of people came.

Q How were you transported from the police station to the Night Court? A In a truck.

Q A patrol wagon? A Yes.

Q You were accompanied in the patrol wagon by your mother and --- A No, my aunt, Morton Byers and myself were in the patrol wagon.

Q Morton Byers was also under arrest? A Yes.

Q Which court were you taken to? A Over here on Center Street.

Q Did you go before a Judge that night? A Yes.

Q Do you know the name of the judge? A No, I don't.

Q When you appeared before the judge was the charge read that time? A Yes, it was.

Q What was the charge? A Disorderly Conduct and Assault Three.

Q How did you ~~please~~ plead to the charges? A Not guilty.

Q At that initial hearing, did you have a lawyer represent you? A At the night court?

Q No? A No, I didn't.

Q Was bail set at that time? A Yes, it was.

Q How much? A $500 bail and $25 cash.

Q When were you let out on bail? A Well, the judge sent me to the hospital - Night Court - I was so badly beaten. I was beaten again in the precinct. My aunt and myself were beaten in the precinct.

Q Who beat you in the precinct? A A whole lot of policemen were there.

Q Were you beaten by more than one policemen in the precinct? A Yes.

Q Were they the same policemen who beat you in the sidewalk? A Yes.

Q Were there other policemen? A Yes.

Q What parts of your body were struck while in the police station? A My ribs, my shoulders.

THE EXAMINER: Indicating the ribs on the left side, the left shoulder.

THE WITNESS: And the part beneath the back, the right knee, they tried to see - when they started I was sitting down and then I stood up, and I was against the wall, I hollered for help and the policemen hit me on my knee.

Q With what? A With that short stick. I was crying at the time, then from there I went to Night Court - the doctor came.

Q Were did the doctor come? A In the precinct the doctor came.

Q Did the ambulance or just the doctor come? A I don't know if there was a doctor -- yes, the ambulance.

Q Did this doctor examine you in the precinct? A He put some bandages, something on my head to take the swelling down. Also my head was bleeding.

THE EXAMINER: Indicating over the right eyebrow.

Q From the court where were you taken? A I was told to go to the hospital, but I was taken to the jail house.

Q The judge sent you to the house? A Yes, the judge stated for me to be sent to the hospital for medical treatment ~~-~~ and they took me into the jail house, me and my parents behind.

Q Which jail? A Atlantic Avenue House of Detention

Q Were you given any medical attention while you were there? A No.

Q How long were you there? A Overnight until about 1:30 or 2 o'clock the next Sunday morning and afternoon.

Q And, then were you let out on bail at that time? A Yes, I was.

Q When you were let out on bail, did you go for medical attention? A Yes.

Q Where did you go? A To the Brooklyn Jewish Hospital.

Q When did you go there? A First the doctor came to my home and the doctor sent me to the hospital.

Q What is the name of this doctor who came to your home? A Nathaniel Plotkin, 665 New York Avenue, Brooklyn.

Q Were any X-rays taken at the Brooklyn Jewish Hospital? A Yes, it was.

s/HAD

Q What parts of your body were X-rayed there? A My ~~head~~ head, my shoulder.

THE EXAMINER: Indicating the left shoulder.

A And, my ribs.

Q Ribs on the right side? A I don't know which side.

Q Any fractures claimed here?

BY COUNSELOR? No, no fractures.

Q Were you kept at the hospital overnight? A No, I asked to be sent home.

Q Did you continue under the care of Dr. Plotkin? A No, I didn't, the family doctor came to my home and he gave me a prescription for medicine.

Q What is the name of your family doctor? A Dr. Leroy Payne.

Q Address? A 991 Herkimer Street, Brooklyn.

Q Any other doctors or hospitals because of these injuries? A No.

Q Did you pay Dr. Plotkin? A No, I didn't. He didn't charge me.

Q Have you paid your family doctor? A Yes, I have.

Q How much was he paid? A $5. for the home visit.

Q One visit he made at home? A Yes.

Q And, did you pay the hospital for the X-rays? A Yes.

Q How much? A X-rays is $28.

Q Did you have any other medical expenses because of this accident?

BY COUNSEL: General charges by the hospital of $300.

Q Medicines and drugs? A I think it was $3 and change.

Q Did you lose any time from your work because of this incident? A Yes.

Q How long are you claiming you didn't work? A About two weeks.

Q Were you paid by your employer for the time you didn't work? A No.

Q Did you ever have a hearing on this charge? A I was charged, I had a hearing on one charge. That was disorderly conduct.

Q When did you have that hearing? A I don't remember the date.

Q Do you remember the name of the judge? A Yes, the name is Judge Grave (phonetics), I think he is.

Q Which court? A Adolescence's Court.

Q Did you testify at that hearing? A Yes.

Q Did you have a lawyer at that time? A Yes.

Q What was the name of your lawyer? A Louis J. Walker.

Q And, his address? A 129 Schermerhorn.

Q What was the outcome of that hearing? A Dismissed

Q Have you had a hearing on the charge of assault ~~22~~ in the third degree? A No, I'm supposed to go on the 18th

and they postponed it to the 24th, this following Wednesday.

Q In other words, it is going to be Wednesday of this week? A Right.

s/HAD

Q TO COUNSEL: If we leave a space will you insert the outcome of the hearing if you have it by that time? Dismissed

Q Have you been examined by our doctor today? A Yes.

Q Did you ever injure the same parts of your body in any other accident? A Yes.

Q What parts of your body have you previously injured? A Once before I injured my back.

Q How? A Lifting.

Q When? A At work.

Q When did it happen; what year or month? A In '61 - September.

Q Did you make a claim at that time? A Yes.

Q A compensation claim? A Yes.

Q Any other prior injuries? A No.

Q Have you been convicted of any crimes? A No.

Q Were you ever on Home Relief? A No.

Q Did you ever make any other claim against the City? A No.

s/HAD

TO COUNSEL: Are you joining ~~anbone~~ anyone besides the City of New York?

BY COUNSEL: Not determined at this time.

Q Did you get a bill from your lawyer? A Yes.

Q What is the amount of the bill? A $250.

Q Is Walker also going to appear for you at the subsequent hearing? A That's right.

Q And is his fee $250 covering the fee for the trial you had and the one you are going to have? A Yes.

SWORN TO BEFORE ME THIS

25th DAY OF May 1963. s/Herman Allan Daughtry

SHELDON ENGELHARD
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-1117360 Queens County
Cert. filed in New York County
Term Expires March 30, 196 ~

J A N E D A U G H T R Y, being first duly sworn, testified as follows:

BY MR RIZZUTO:

s/JD

Q Your name, please? A Jane Daughtry.

Q Where do you live? A 5522 Mc~~Donald~~ Donough Street, Brooklyn.

Q How long have you been living there? A Well, I live there, but I have been living on and off since my mother moved there, since ~~1933 1944~~ - I have been there for the past ten years and he has been there all the time, since ~~he was born.~~ Herman Daughtry was born.

s/JD

Q What is your husband's name? A Herman Daughtry.

Q He is alive? A He is dead.

Q You are a widow? A I am a widow.

Q Is Herman married? A Yes, he is married.

Q Is he what they call emancipated, he pays his own bills? A Yes.

Q Have you heard me ask Herman about expenses regarding the doctor's bills and other bills? A Yes, I did.

Q Were all these other bills paid by Herman or will Herman pay these bills eventually? A Yes, they are paid.

Q You didn't pay these bills? A Yes, I did.

Q Did you or Herman? A I paid these bills - the doctor.

Q You paid the doctor bill? A Yes.

Q Which bills did you pay? A I paid the doctors bills, I paid his bail.

Q How much did that cost you? A $25. for the bail and the doctor bill. Was 25 out $31.00

JD

Q How about the lawyer, did he pay him? A Well, my son has to pay it.

Q Herman is paying it? A Yes.

Q You were a witness to this incident? A Yes, I was.

Q Where were you? A I was in the home and then in the street.

Q And, were you called down to the street by anybody? A Yes.

Q And, who called you down there? A My daughter.

Q Her name? A Her name is Wilhelmina.

Q Where did you go when she called you? A I went to the window and I peeped and I saw all the cops and I ran down to the corner.

Q When you were down to the corner, where was Herman? A He was -- they had him against -- one cop had him at the time.

Q Had him there? A He was standing and was talking to him and I came and the other cop had his gun waving.

Q What is his name? A ~~Maximum~~ Matzel, and I told him he was not to shoot and I asked what was wrong, and when I asked what was wrong, the cop said he couldn't really tell me, ~~really~~ at the time, and this cop ~~says~~ said 'What's the matter?' and this cop told me: 'I don't know, I am just here'. I said: "What was going on?", he said: "Well I couldn't tell you". "Well", I said, "was he under arrest?", he said: "I don't know yet". So then he went and he ~~asked~~ asked this cop, Matzel and he said "~~why is~~ is he under arrest?", and he said: "Take him down to the precinct." He didn't have to whip him in the street and they took me to the precinct.

Q Was he whipped in the street? A Yes, ~~they did~~ he was.

Q He was whipped after you got there? A When he got to the corner they had beaten him up.

Q He had beaten him up? A Yes.

Q Did you see him? A ~~Yes, I saw him beaten.~~ NO

Q Where were you when they beat him? A I had come out of the house.

Q Was he being beaten by one policeman or more than one? A ~~He was only beaten by this one, they took us in the car and he took us to the precinct.~~ I don't know

Q Were you with Herman at all times when you were in the precinct? A That's right ~~he~~ I was there all the time.

Q Was he beaten in the precinct? A Yes.

Q In your presence? A In my presence.

Q Do you know how many officers beat him? A I'd say 18 to 25 of them were in that precinct.

Q What did you do? A I hollered and tell them to stop and they refused to stop.

Q Were you in Court when he was taken to Night Court that night? A Yes, I went down there but I got there too late. My father went there before I got there and he said ~~was supposed to be gone, they said that~~ he Herman would come out that night, but ~~after~~ the Judge said he was supposed to go

s/JD

to the hospital because the boy was beaten bad, ~~so I left.~~ Then I got up that morning and the boy come home that night, he said that he was out of xjail.

Q Which boy? A Martin Byers.

Q Was he the one that was arrested with him? A Yes, and he said that he was there and he was in pain.

s/JD

Q Where? A He was at the ~~precinct~~ house of detention in pains. So, I got up that morning, I got up about 6 o'clock and I started calling. I called Kings County, I called Bellevue, I called up the City Hospital, and they said they didn't have him there, I turned and I called the jail. They didn't tell me nothing in there. Then my lawyer called me by 10 in the morning so he told me he located him for me that morning.

Q Where was he? A He was at the House of Detention in Brooklyn.

Q Had you ever been on Home Relief? A No.

THE EXAMINER: That's all.

s/ JANE DAUGHTRY

SWORN TO BEFORE ME THIS

27th DAY OF May 1963.

s/

SHELDON ENGELHARD
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-1117360 Queens County
Cert. filed in New York County
Term Expires March 30, 1965

114. Summons, Supreme Court, With Not

10M 7-56
A ROBBINS PRODUCT

Robbi tationery Co., Inc., Law Blank Publishers
Warren Street, New York 7, N. Y.

Supreme Court of the State of New York
County of KINGS

HERMAN DAUGHTRY, an Infant, by JANE DAUGHTRY, his Guardian ad Litem,

Plaintiff

against

CITY OF NEW YORK

Defendant

Plaintiff designates

Kings *County*

as the place of trial.

Summons ~~with notice~~

RECEIVED
LAW DEPARTMENT
1963 JUN 3 PM 3 40
OFFICE OF
CORPORATION COUNSEL

To the above named Defendant :

You are hereby Summoned *to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint*

Dated. May , *19* 63

VLADECK & ELIAS

*Attorney*S *for Plaintiff*

Office and Post Office Address:
280 Broadway
New York 7, N. Y.

Plaintiff's address:
522 McDonough Street
Brooklyn, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
- X

HERMAN DAUGHTRY, an Infant, by
JANE DAUGHTRY, his Guardian ad Litem,

Plaintiff,

-against-

CITY OF NEW YORK

Defendant.
- X

Plaintiff, complaining of the defendant, by his attorneys, VLADECK & ELIAS, alleges:

1. That plaintiff is an infant over the age of fourteen years and resides in the County of Kings, City and State of New York; that heretofore and prior to the commencement of this act by an order of this Court duly made and entered on the 19th day of July, 1962, JANE DAUGHTRY was duly appointed Guardian ad Litem of the said infant plaintiff for the purpose of bringing and maintaining this action.

2. At all times hereinafter mentioned the defendant was and still is a municipal corporation duly organized and existing under the laws of the State of New York.

3. Among the duties imposed by law upon the defendant, CITY OF NEW YORK, and provided by its Charter, was a duty to operate and control a Police Department wherein, among others, policemen were employed as servants, agents and employees of defendant and under its supervision and control.

4. That on or about April 28, 1962, while the plaintiff was lawfully and properly on the public streets and sidewalks in the vicinity of the intersection of Patchen Avenue and McDonough Street, in the Borough of Brooklyn, City of New York, he was, on and about his head and body,

without just or legal cause and provocation, wrongfully, maliciously, illegally and improperly, and by use of force and arms, set upon, beaten, ill-treated, mistreated and assaulted by agents, servants and employees of defendant, namely policemen who were members of the Police Department of defendant, who allegedly were acting in the course and performance of their duties within the scope of their authority and employment on behalf of defendant.

5. That the improper and illegal force and violence described above began about 9:00 p.m. on the said April 28, 1962 and continued for a period of several hours thereafter; the said assault, battery, illegal and wrongful acts commenced on the public streets and sidewalks in the vicinity of McDonough Street and Patchen Avenue, both in the County of Kings, Borough of Brooklyn, City and State of New York, and then continued in a police vehicle, which upon information and belief, was owned and operated by the said defendant CITY OF NEW YORK; that during such time plaintiff was being improperly and forcibly taken to the Police Precinct located at 16 Ralph Avenue, known as the 81st Police Precinct, in the Borough of Brooklyn, County of Kings, and such assault, battery, illegal and wrongful acts continued thereafter at the aforesaid 81st Police Precinct; that all during the times aforesaid on the date referred to, in the Police vehicle referred to and in the 81st Police Precinct, the plaintiff was illegally, improperly and unjustifiably arrested, imprisoned and mistreated, abused, beaten and numerous batteries were committed upon his person and that said acts were done without just or legal cause and provocation.

6. That said assault by the defendant, its servants, agents and employees was done maliciously, wrongfully, recklessly, unreasonably and illegally, was unprovoked and unjustified and occurred without any fault on the part of the plaintiff.

7. That as a result of the foregoing, plaintiff was made sick, sore, lame and disabled and sustained shock and numerous serious injuries, bruises, tenderness, ecchymosis, hematoma and the like on and about his head and body.

8. That in addition thereto, the defendant, its agents, servants and employees falsely arrested and accused the plaintiff, falsely and improperly imprisoned and detained him, all in violation of law; that as a result thereof plaintiff was deprived of his liberty and the said arrest and imprisonment was in violation of the Constitution of the United States and the State of New York and deprived plaintiff of due process of law.

9. As a result of the injuries to plaintiff, as aforesaid, plaintiff was forced to remain in bed and was confined to his home for a substantial period of time and remained away from his employment.

10. That thereafter and on or about July 25, 1962, and within 90 days after the claim herein sued upon arose, and prior to the commencement of this action, the plaintiff, as claimant, caused a notice of claim in writing, sworn to by or on behalf of him, to be served upon the defendant, CITY OF NEW YORK, in duplicate, by delivering the same personally to the Comptroller of the defendant. Said notice of claim set forth the name and post office

address of the claimant and his attorneys; the nature of his claim; the time when, the place where and the manner in which his said claim arose; and the items of damage or injuries claimed to have been sustained by the plaintiff so far as then practicable.

11. That more than 30 days have elapsed since such claim was so presented to defendant and the defendant has neglected and refused to make any adjustment or payment thereof for 30 days after such presentment.

12. That this action has been commenced within one year and ninety days after the happening of the event upon which the claim was based.

13. That by reason of the premises, the said plaintiff has been damaged in the sum of $100,000.00.

WHEREFORE, plaintiff demands judgment against defendant in the sum of $100,000.00, together with the costs and disbursements of this action.

VLADECK & ELIAS
Attorneys for Plaintiff
Office & P. O. Address:
280 Broadway
New York 7, New York

JUN 27 1963

SUPREME COURT : KINGS COUNTY

- -x

HERMAN DAUGHTRY, an Infant, by JANE DAUGHTRY, his Guardian ad Litem,

Plaintiff :

-against- : Reg. 505 Folio 200

THE CITY OF NEW YORK :

Defendant :

- -x

S I R S :

PLEASE TAKE NOTICE that you are required, within ten days after the service of this notice upon you, to serve upon the attorney for the defendant, The City of New York, a verified bill of particulars setting forth in detail the following particulars, pursuant to Rules 116 and 117 of the Rules of Civil Practice:

1. The date and approximate time of the day of occurrence;

2. The location of the alleged occurrence;

3. What the plaintiff was doing at the time of the alleged assault and arrest, together with the facts and circumstances leading up to the alleged assault and arrest;

4. The name or names and addresses of anyone who was present at the time of the alleged assault and arrest;

5. A detailed statement of the injuries allegedly sustained by the plaintiff, and a description of those claimed to permanent;

6. The nature of employment of the plaintiff at the time of the alleged assault and arrest and the time lost from said employment, if any;

7. Name and address of employer of the plaintiff;

8. Total amount claimed as special damages for (a) physicians' services and medical supplies; (b) loss of earnings; (c) hospital expenses; (d) nurse's services; (e) legal and other fees.

9. A detailed statement of any and all other damages claimed.

Dated: New York, N. Y.
JUNE 25, 1963

Yours, etc.,

LEO A. LARKIN
Corporation Counsel
Attorney for Defendant
CITY OF NEW YORK
Office & P. O. Address
Municipal Building
Borough of Manhattan
New York 7, N. Y.

TO: VLADECK & ELIAS, ESQS.

Plaintiff
Attorney for [redacted]
280 Broadway
New York 7,N.Y.

dr-4

SUPREME COURT : KINGS COUNTY

- x

HERMAN DAUGHTRY, an infant by JANE DAUGHTRY, his Guardian ad Litem,

Plaintiff,

against

THE CITY OF NEW YORK,

Defendant.

Copy Received
By mail - 7/1/63
VLADECK & ELIAS
Attorneys for Plaintiff

- x

The defendant answering the complaint herein, upon information and belief, alleges:

FIRST: Denies having any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph of the complaint designated "1".

SECOND: Denies each and every allegation contained in paragraph of the complaint designated "3", except that the City of New York maintains a police department and on April 28, 1962 certain police officers were employed in the said department and acted as such police officers.

THIRD: Denies each and every allegation contained in paragraphs of the complaint designated "4", "5", "6", "7", "8", "9" and "13".

FOURTH: Denies each and every allegation contained in paragraphs of the complaint designated "10", "11" and "12", except that on or about the 25th day of July, 1962 and prior to the commencement of this action, a notice of claim was presented to the Comptroller of the City of New York, and that more than thirty days have elapsed since such presentation and that no adjustment thereof has been made; and that this action was commenced within one year and ninety days after its alleged accrual.

AS A FIRST, SEPARATE, COMPLETE AND DISTINCT DEFENSE TO THE CAUSE OF ACTION SET FORTH HEREIN, AND IN JUSTIFICATION THEREOF, THE DEFENDANT, THE CITY OF NEW YORK, ALLEGES:

FIFTH: That at all the times mentioned in the complaint the defendant, The City of New York, maintained and operated a Police Department as provided by law and that the police officers attached to said department are obliged to detect and suppress crime and to apprehend and arrest offenders against the Penal Laws of the State of New York.

SIXTH: That at no time did the defendant, The City of New York, or any of its police officers, commit any of the acts alleged in the complaint, but if it be determined that any police officers did commit any of the said acts and if it be determined that such acts were committed within the scope of their employment as police officers then all such acts of the police officers were performed without malice and with reasonable and probable cause in the performance of their duties as police officers in the Police Department of The City of New York.

FOR A FIRST, SEPARATE AND PARTIAL DEFENSE AND IN MITIGATION OF DAMAGES, IF ANY, THE DEFENDANT, THE CITY OF NEW YORK, ALLEGES:

SEVENTH: Repeats and realleges each and every allegation contained in the paragraphs of this answer designated "SECOND" and "FIFTH".

EIGHTH: That at no time did the defendant, The City of New York, or any of its police officers, commit any of the acts alleged in the complaint, but if it be determined that any police officers, did commit any of the said acts and if it be determined that such acts were committed within the

scope of their employment as police officers then all such acts of the police officers were performed in good faith and without malice in the ordinary course of his duties as police officers in the Police Department of the City of New York and as peace officers of the State of New York.

WHEREFORE, the defendant demands judgment dismissing the complaint herein, with costs.

LEO A. LARKIN
Corporation Counsel
Attorney for Defendant
Office & P.O. Address
Municipal Building
Borough of Manhattan
City of New York

State of New York,
County of New York, } *ss.:*

Jack Cherrill

....., being duly sworn, says that he has been duly designated as Acting Corporation Counsel of The City of New York, and as such that he is an officer of the Defendant, The City of New York, in the above-entitled action. That the foregoing answer is true to his knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the Defendant, The City of New York, is that it is a corporation; that the grounds of his belief as to all matters not therein stated upon his knowledge are as follows: Information obtained from the books and records of the Law Department and other departments of the city government and from statements made to him by certain officers or agents of the Defendant, The City of New York.

JSR

Jack Cherrill

.....

Sworn to before me, this

.....day of JUN 27 1963 **19.....**

MILLICENT BRAITHWAITE
Commissioner of Deeds, City of New York
No. 4-167
Cert. Filed in New York County
Commission expires Jan. 29, 1965

----------X

In the Matter of the Claim

of

HERMAN DAUGHTRY, an Infant, by
JANE DAUGHTRY, his Guardian Ad Litem

-against-

THE CITY OF NEW YORK

----------X

TO: COMPTROLLER OF THE CITY OF NEW YORK
Municipal Building
New York City

PLEASE TAKE NOTICE that HERMAN DAUGHTRY, an Infant, by JANE DAUGHTRY, his Guardian Ad Litem, pursuant to statute in such cases made and provided, does hereby make claim against the City of New York, its agents, representatives, servants and employees and more particularly certain police officers, employees, agents, servants and representatives of the said City of New York, the names of whom are presently unknown to plaintiff, in the sum of $100,00.00, and in support of such claim, does hereby state the following:

1. Claimant is HERMAN DAUGHTRY, an Infant, by JANE DAUGHTRY, his Guardian Ad Litem. His post office address is 522 McDonough Street, in the Borough of Brooklyn, County of Kings, City and State of New York. His attorneys are VLADECK & ELIAS, whose post office address is 280 Broadway, New York 7, New York.

2. The nature of the claim is as follows: the claimant assertsa claim for damages by reason of the wrongful assault and battery upon the person and body of said HERMAN DAUGHTRY and for the wrongful, false and improper arrest of said HERMAN DAUGHTRY, and for pain, suffering and shock and

injuries suffered by him.

3.(a) The time when the claim arose began approximately 9:00 p.m., April 28, 1962 and continued for a period of several hours thereafter.

(b) The place where the claim arose first occurred on the public streets and sidewalks in the vicinity of the intersection Patchen Avenue and McDonough Street, in the Borough of Brooklyn, City and State of New York, and continued thereafter in police vehicles while being forcibly and improperly taken to the 81st Police Precinct located at 16 Ralph Avenue, Brooklyn, and further continued thereafter at the said 81st Police Precinct.

(c) The manner in which the claim arose was a deliberate, unlawful, unjustified, inprovoked, willful and wrongful assault and battery on and the false and improper arrest of the said HERMAN DAUGHTRY by police officers of the City of New York, whose names are presently unknown to the claimant herein, acting for and on behalf of the said City of New York, and as its agents, employees and servants, and that such beating was upon the body and person of the said HERMAN DAUGHTRY by using hands and various weapons to beat, seize, drag, pull, attack, illtreat and mistreat the said HERMAN DAUGHTRY, and without any fault on his part whatsoever. While the said HERMAN DAUGHTRY was lawfully on the street at and near the aforesaid intersection of McDonough Street and Patchen Avenue in the Borough of Brooklyn, City and State of New York, the said police officers acting for and on behalf of the said City of New York used unnecessary, unwarranted and improper and illegal force and illegally and falsely took and arrested said HERMAN DAUGHTRY from the

vicinity of Patchen Avenue and McDonough Street to the aforesaid Police Precinct and that illegal and wrongful acts and arrests, batteries and assaults were committed upon the body and person of the said HERMAN DAUGHTRY, both on the street as described, in the police vehicle and at the 81st Precinct.

4. As far as claimant is now able to ascertain the items of injuries and damage sustained by the said HERMAN DAUGHTRY include severe contusions, abrasions, excruciating pain, shock from which he has suffered ever since and upon information and belief, will continue to suffer as a result of the improper assault and battery as described above and the illegal detention and arrest as described herein.

I, HERMAN DAUGHTRY, an Infant, by JANE DAUGHTRY, his Guardian Ad Litem, request that this claim be allowed and paid.

PLEASE TAKE FURTHER NOTICE that unless this claim is adjusted and paid within 30 days from the date of its presentation to you, it is the intention of the undersigned to commence suit thereon against the City of New York and such of its agents, employees and representatives presently unknown to plaintiff, who in anyway participated in inflicting any of the acts complained of herein to the said HERMAN DAUGHTRY, and to recover the aforesaid sum of $100,000.00 for said HERMAN DAUGHTRY, together with all costs and disbursements.

Dated: New York, July 20, 1962.

/s/ HERMAN DAUGHTRY
HERMAN DAUGHTRY, Claimant

/s/ JANE DAUGHTRY.
JANE DAUGHTRY, Guardian Ad Litem

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

- -x

HERMAN DAUGHTRY, an Infant, by
JANE DAUGHTRY, his Guardian ad Litem,

Plaintiff,

-against-

CITY OF NEW YORK

Defendant.

- -x

IT IS STIPULATED AND AGREED by the undersigned that Carl Rachlin, Esq. of 165 West 46th Street, New York, New York, be and he hereby is substituted as attorney for the Plaintiff in the above entitled action in place and stead of Vladeck and Elias, Esqs.

Dated: New York, New York
February / March 12, 1964

Vladeck & Elias
Vladeck and Elias,
Attorneys for Plaintiff

Herman Daughtry, an Infant,
by Jane Daughtry, his Guardian
ad Litem

By: Jane Daughtry
Plaintiff

Carl Rachlin

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On the 12th day of ~~February~~ March, 1964, before me personally came JANE DAUGHTRY, to me known and known to me to be the individual described in and who executed, the foregoing substitution of attorneys, and acknowledged to me that she executed the same as Guardian ad Litem of Herman Daughtry, an Infant.

Sheldon Engelhard

Sworn to before me this
12th day of ~~February~~ March, 1964.

SHELDON ENGELHARD
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-1117360 Queens County
Cert. filed in New York County
Term Expires March 30, 1969

Acquit Father In Cop Assault

Herman Daughtry, 19, of 522 McDonough St., Brooklyn, was acquited last Wednesday of assaulting Ptl. Arthur Matzel of the Ralph Ave. precinct, April 28, 1962, after trial before Judge Ludwig Glowa in Criminal Court. Herman, father of two, was previously acquitted of disorderly conduct.

Represented by attorney Louis J. Walker, Daughtry who is employed as a clerk, was arrested along with Martin Byers, 19, of 518 McDonough St. His aunt, Mrs. Henrietta Tolliver, 22, of 522 McDonough St. was also arrested when she went to inquire of his arrest.

Attacked

Walker informed the court that his client was beaten about the head and body by Ptl. Matzel at the corner of Patchen Ave. and McDonough St. Ptl. Matzel testified that he was attacked by Daughtry but during cross examination he admitted striking the youth three times with his nightstick.

Walker informed the court that his client was on his way to the store for his mother, Mrs. Jane Daughtry, when he stopped and talked to some of his friends on the corner. The attorney claimed the officer walked over to the boys and ordered them to get out of there.

Beaten

Daughtry said he was beaten and driven to the Ralph Ave. precinct where his aunt, Mrs. Tolliver was handcuffed to a pole inside the preceint and beaten. Daughtry said he was taken to court and then lodged in Raymond Street jail without the benefit of medical care.

He stated that he was taken to Jewish Hospital for treatment only after he was bailed. Judge Glowa dismissed the assault charge.

7/25/62 - filed Claim with Comptroller

5/31/63 Shelly personally served the transcript of testimony, exam'd, of Herman Daughety and Jane Daughety upon the Land Dept. of N.Y.C. in rm. 1532 of the Municip. Bldg N.Y.C.

6/3/63 Shelly - personally served the Summons & Complaint upon Corp. Counsel in rm. 1532 of the Municipal Bldg. and received an admission of service.

6/20/63 Stip to extend time to answer dated 8/20/63.

9/1/63 Rec'd by mail DS Answer and demand for B/P

July 12, 1943

Mr. Herman Daughtry
922 McDonough Street
Brooklyn, New York

Dear Mr. Daughtry:

Enclosed herewith is a paper appointing your mother as your guardian. Would you please sign your name at the place indicated by your initials and have your mother sign her name at the two places indicated by her initials. Both you and your mother must sign before a notary public.

I would appreciate your returning the enclosure to me immediately after it has been executed.

Sincerely yours,

CR:cr
enc.

CARL RACHLIN

September 22, 1962

Mr. and Mrs. Herman Daughtry
718 McDonough Street
Brooklyn, New York

Re: Daughtry v. City of New York

Dear Mr. and Mrs. Daughtry:

We have been notified by the Comptroller of the City of New York that they wish to examine you in relation to your claim against them. The hearing is scheduled for October 22, 1962 at 9:30 a.m., at their offices.

It will be necessary that both of you be present at that hearing. At some time during the next few weeks, it will be necessary for you to come to our office in order that we may prepare you for the above-mentioned hearing. At your earliest convenience, please call us in order that we may schedule an appointment at a mutually convenient time.

Your cooperation in this matter will certainly be appreciated.

Very truly yours,

VLADECK & ELIAS

SE:sw

By: SHELDON ENGELHARD

November 1, 1963

MEMORANDUM

TO: Mr. Carl Sachslin

FROM: Mr. Sylvan Elias

RE: Toliver vs. City of New York and Daughtry vs. City of New York

I believe that you should examine the [redacted] of New York BY THE POLICEMAN INVOLVED before trial in the above matters. Under the [redacted] it is no longer necessary to obtain a court order to examine a public corporation, but notice is sufficient. The notice is a simple one—see CPLR rule #3107 and sections prior to [redacted] following.

SE:bac

LAW OFFICES OF

LIEBMAN, EULAU, ROBINSON & PERLMAN

WALTER H. LIEBMAN (1931-1963)

MILTON B. EULAU
HERBERT ROBINSON
JULIAN S. PERLMAN
THEODORE J. JACOBS
JAY GOLDBERG
THOMAS R. ASHER

LOUIS P. EISNER
COUNSEL

32 EAST 57TH STREET
NEW YORK, N. Y. 10022
212 ELDORADO 5-5522
CABLE ADDRESS
"STATUTE NEW YORK"

September 21, 1965

Mr. Carl Rachlin
Congress of Racial Equality
38 Park Row
New York, N. Y. 10038

Re: Daughtry v. City of New York
Toliver v. City of New York

Dear Mr. Rachlin:

Mr. Robinson is presently out of town and has been out of the State a great deal recently. He regrets that for that reason he has been unable to handle the above cases and has asked that I therefore return the files to you. They are enclosed herewith.

Sincerely yours,

Grace M. McSweeney

Grace M. McSweeney
Secretary to Mr. Robinson

M

Enclosures

1

Inspector Moran @ 10 am
2/3/63

H. Tobin

May 2 '62 made d
against Halpin

Ry. inspector noted boy passed.
gave off 4647
Obsn - asked what
was happening
+ identn: off
ordered her out +
told her to get
away. Ref. car.
comment. Halpin
started to beat
neighbour. Cautn
Wm. Tobin. Mobbed
started to push
Tob to get into
car. Her dress
fell off + when
she went to get
them they burst

– ag Ver called
Ver a Mark
Lutcher. Morning
to Myers Ver.
– Tol + Byers
were taken in
Cir Ct yest. +
stated to ground
Tol.
(Cannot identify Pl
pict. Offer in Ev).
Blame Com Off
on Steed.
Mr Lutcher room of
Stober house. When
Ver went to look
at Jan in room
she was last. Tol
fingerprinted by Hobbs.
The other + Mayfield
least Dougherty.

Sister, Daughter, Son,
friend in mind
the time. Boys in
mind time & Real
young.
Husband, father & Mrs
come & pet., met
in back room. 18 a
25 of the police.
Son. Daughter met
a prisoner.
- after the beating
an ambulance
doctor came in
but wasn't needed.
Dr. Wrapped Daughter
head in bandage.

Want to jail court.

- did not know
charge until
she went to
court.

~~Daughter~~

- blouse was torn off.

- Daughter, victim of robbery.

Could see "camera" from cpt.

- Mabel was beating Daughter

- Morning delivered to find out was was wrong: Herman was put in car with His wife & Jane.

- Capt. saw Sgt. Herman & Dick Herman and takes them back. J. D. wants Herman into

bathroom. Heard way
door to door

- Murphy, KK also
heard Doughty

- Judge in note A
was supposed to
be taken to the
hospital. The
next am. called
all hospitals. The
lawyer found him
in jail & he
was bailed out.

Brand Daughtry, wife

came from house &
came & a lot of
people there, so a.
Waight round for
all Hearn et al.
pushed Hearn
against wall. Waight
elbowed Brand away.
Brenda held on &
husband. Waight
hit Hearn with
club. Hearn
staggered away
& passed out & /
Waight kicked Hearn
in ribs.

went into car
car with Daughtry &
mother.

saw cop but
did. head against
the car.

Breidy mail in book
room & deliv see in
book room.

Victoria Square
(Langtabs / Hen Vol

deliv see any
of the

Arthur Matzel, pitt. - 1860 - 8/st

~~1. walking 4=62 -~~
~~foot~~

1. Working 4/ja - 12. mda.

2. walking on Pakiha &
McDonald - saw 5
Gourdes - 1 heard a
bullock & whistle &
1 heard a bullock
& bell. Pedestrian
heard to walk &
stand. "Mansfield"
HD road no
across that must
& call box &
asked for assistance.

Daughty called Matz
call him a m-f
rookie cop & shoved &
left A.M.

- were you left.

- asked about 10 yr.
old

- Eb

a boatload of
crowd.

— handcuffed H.T.
to not wanna the
elected to leave.

— H. T. ripped blouse
off.

Mobiko

agrees with Matzel

disturbed D. Dr bedroom

- could she have been in room?

Murphy

- room as Aber Hess

Sgt. Hermann, Rec. Co.

~~Geo~~

~~2 persons 2 Aff~~

– blouse torn partly from one side.

– a delegation of 25 came in.

– another patient came in with a foot affection.

SEDFRE

DAVENPORT, PAUL, R. VS. NEW YORK 1967
(ROBBERY + RAPE)

Box 36
Folder 9

State Historical Society Of Wisconsin

Please Retain Original Order

BELDOCK LEVINE & HOFFMAN
385 MADISON AVENUE
NEW YORK, N. Y. 10017

ELLIOT L. HOFFMAN
LAWRENCE S. LEVINE
MYRON BELDOCK

ERIC D. MARTINS
DANIEL E. GILIOLI
Member Ohio & D. C. Bars

(212) PLAZA 2-2299
CABLES: TELHOFFLAW

Corso di Porta Romana, 132
Milan, Italy
Tel: 58-99-22

Counsel:
GILBERTO GILIOLI
Member Republic of Italy Bar

August 3, 1967

Stephen Nagler, Esq.
SEDF
150 Nassau Street, Rm. 1030
New York, N. Y.

Re: People of the State of New York
v. Paul R. Davenport and Pritchard

Dear Steve:

In line with our conversation today, this is to confirm the fact that you are authorized to appear of counsel on behalf of Mr. Davenport when the case is called in Part II on August 7th, and that you are also authorized to file a notice of appearance of counsel, if you need to do so to obtain a notice to the Warden in order to speak to Davenport in the Pen.

Please attempt to have the trial of the case adjourned until September. I would prefer it if it could be adjourned until September 11th, at which time I would expect that both Bob Kasanof and I will be ready for trial. Please advise the Court of the following simple reasons for this requested adjournment.

First, we have not received a bill of particulars from the District Attorney's office, although an Order with notice of entry was served by mail on June 30th. Since this is a case where we have potential alibi witnesses for both defendants, it is very important that we receive the bill of particulars specifying, among other things, the exact time and place of the crime, if we are to be able properly to prepare the defense.

Incidentally, I called the Assistant District Attorney, Louis Ernst, who is currently in charge of Part II, on August 2nd, to remind him that we need the bill of particulars as soon as possible. He said he would do the best he could to have it prepared but he was then very busy in the midst of a trial. He nevertheless offered to provide us with the necessary information orally as soon as he could, if we reminded him of the fact when we next see him in Court. I would appreciate your following through on this in this respect on August 7th.

The Court should also know that we have an order authorizing retention of an investigator at County expense and have fully advised such an investigator, but we have been withholding his investigation until we receive the information called for by the order for the bill of particulars.

If an additional reason is needed for the adjournment, I would ask the Court, on a personal basis, to put the case over to September. I have not had a vacation for two years and intend to leave on August 11th and be away until just after Labor Day.

I would appreciate your explaining all these problems very carefully to Mr. Davenport so that he will not become discouraged with the delay. In this case it is essential to Davenport's defense that there be a thorough investigation by the detective, and to rush the case to trial next week without such investigation would be foolhardy and might be fatal.

Incidentally, I will send you and Bob Kasanof a copy of a memorandum I am preparing for the investigator. Please feel free to give him any additional information that may occur to you and aid him.

Sincerely yours,

Myron Beldock

MB:TS

CC: Robert Kasanof, Esq.

BELDOCK LEVINE & HOFFMAN
385 MADISON AVENUE
NEW YORK, N. Y. 10017

ELLIOT L. HOFFMAN
LAWRENCE S. LEVINE
MYRON BELDOCK

(212) PLAZA 2-2299
CABLES: TELHOFFLAW

August 9th, 1967

Mr. T. H. Tracy
420 Lexington Avenue
New York, New York

RE: People v. Paul R. Davenport
and George Pritchard
Supreme Court, Kings County

Dear Tom:

I enclose a memorandum for your use in investigating this case. Trial has been set for September 11th.

I also enclose a copy of the Indictment; a copy of Davenport's letter dated April 3, 1967, entitled "My Story"; a copy of an affidavit which I submitted in support of Motion to Dismiss the Indictment; and a copy of the Daily News article concerning this case.

I have not yet received a written bill of particulars from the District Attorney. We are entitled to be advised of the full name and address of the victim and any aliases, nicknames or pseudonyms; the exact date and time of the alleged crime; an accurate description of the place where the alleged crime took place; and a description of the weapon or weapons alleged to have been employed. But the Assistant District Attorney presently in charge (louis Ernst 643-5141) gave us the information orally which is incorporated in the enclosed memo.

I recognize that I ma handing you a rather difficult job without as much hard information as I would like, but this is the best I have been able to obtain up to now.

Mr. Nagler has been making every effort - so far unavailing - to get in touch with George Pritchard's brother Douglas, who was one of the group in which the two defendants were to be found during part of the day of the crime (April 3, 1967). We will try to get him to you as soon as possible. In the meantime, I suggest you might get started by contacting the Davenport family and Messrs. Haynes and Bass. Mrs. Davenport and her daughter Ruth Carol are both very anxious to extend themselves to help Paul.

Please feel free to call upon Mr. Nagler, Mr. Kasanof or myself for any assistance you may need. While I am on vacation (through Labor Day) speak to Mr. Martins or Miss Hayman of my office if you need help.

I also enclose a copy of a letter I am sending to the Prison in the hope that it will enable you to interview Davenport and Pritchard, if you find it necessary. If you have any difficulty about getting to see them in the Prison, I suggest that you call Mr. Nagler at 964-8120. Hopefully, he will have filed a notice of appearance, of counsel to both Mr. Kasanof and myself, and will have obtained a notice to the Warden so that he can go with you and help you to get to see the defendants.

Mr. Nagler has been trying valiantly to obtain some commitment from Brooklyn CORE, the organization that got us involved in this case in the first place, to pay some reasonable amount to supplement whatever the State may pay you for the expected investigation. However, since there has not yet been any favorable response, I think you will have to assume that the only sure source of payment will be through the application to the Court. Please guide yourself accordingly.

When you get to the point where you run up more than $300.00 or so in work, please speak to me before you proceed.

Since the Court order authorized both defendants, that is Davenport and Pritchard, to employ you jointly, it may be possible that the Court will think there is greater justification for going beyond the normal statutory minimum of $300.00 and thereby we can end up paying a reasonable fee for your work.

Sincerely,

Myron Beldock

MB:jl
Encls.
Cc: Stephen Nagler, Esq.
Robert Kasanof, Esq.

BELDOCK LEVINE & HOFFMAN
385 MADISON AVENUE
NEW YORK, N. Y. 10017

ELLIOT L. HOFFMAN
LAWRENCE S. LEVINE
MYRON BELDOCK

(212) PLAZA 2-2299
CABLES: TELHOFFLAW

August 9th, 1967

Warden, Queens House of
Detention for Men
126-02 82nd Street
Kew Gardens, New York

RE: People v. Paul R. Davenport
and George Pritchard
Supreme Court, Kings County

Dear Sir:

I am acting as attorney for Paul R. Davenport, who is an inmate at your Prison. I am writing on his behalf, as well as on behalf of another inmate and co-defendant, George Pritchard, who is represented by Robert Kasanoff, Esq. Both defendants have obtained an order in the Supreme Court, Kings County, to hire an investigator to act for both the defendants' behalf. The investigator in question is Mr. Tom H. Tracy, 420 Lexington Avenue, New York, New York, (MU-5-3140).

I enclose a copy of the order authorizing the retention of an investigator, made by Justice Miles F. McDonald on June 7, 1967.

In order that Mr. Tracy may properly perform his services, it may be necessary for him to interview the defendants at your Prison. I would appreciate your placing an authorization on file (in regard to both of these defendants) so that Mr. Tracy will be able to see them without any difficulty whenever he wishes to do so. Incidentally, Stephen Nagler, Esq., SEDF 150 Nassau Street, Room 1030, New York, New York is acting of counsel to both Mr. Kasanoff and myself in regard to Pritchard and Davenport. I would also appreciate your placing similar authorization on file so that Mr. Nagler can interview either of the defendants at the prison. Please advise me immediately if there will be any difficulty in fulfilling these requests.

MYRON BELDOCK
LAWRENCE B. LEVINE
ELLIOT L. HOFFMAN

BELDOCK LEVINE & HOFFMAN

I enclose a copy of my notice of appearance and ask that it also be placed on file.

Thank you for your cooperation.

Very truly yours,

Myron Beldock

MB:jl

Encls.

Cc: Mr. T. H. Tracy
Stephen Nagler, Esq.
Robert Kasanoff, Esq.

P.S. Dear Steve:

Please send Mr. Tracy any information and copies of statements you may have.

MB

BELDOCK LEVINE & HOFFMAN
385 MADISON AVENUE
NEW YORK, N. Y. 10017

ELLIOT L. HOFFMAN
LAWRENCE S. LEVINE
MYRON BELDOCK

ERIC D. MARTINS
DANIEL E. GILIOLI
Member Ohio & D. C. Bars

(212) PLAZA 2-2299
CABLES: TELHOFFLAW

Corso di Porta Romana, 132
Milan, Italy
Tel: 58-99-22

Counsel:
GILBERTO GILIOLI
Member Republic of Italy Bar

August 10, 1967

Stephen Nagler, Esq.
SEDF
150 Nassau Street, Rm. 1030
New York, N.Y.

Re: People of the State of New York v. Paul R. Davenport and Pritchard

Dear Steve:

As you know, I am leaving on vacation tomorrow and will not be back until Labor Day.

I discussed this case at some length during a conference with Mr. Tracy today. We both feel that Brooklyn CORE, having inspired us all to become involved in this case, should send us a check in the amount of $100 to cover out-of-pocket expenses for Mr. Tracy.

Tracy estimates that he will need around $60 or so for a tape recorder which he hopes to use while interviewing the complainant and her husband, and perhaps for interviews with others. He also anticipates travel expenses and expenses in advancing subpoena fees to the various prospective witnesses.

Please do what you can to see to it that Brooklyn CORE makes this payment to you or to our office or to Tracy as quickly as possible. I would really feel that the organization let us all down if it could not extend itself that far, after we have all taken the responsibility of doing the work in this case.

Sincerely yours,

Myron Beldock

MB:TS

CC: Mr. T. H. Tracy

FROM: Myron Beldock

TO : T. H. Tracy

CONFIDENTIAL
MEMORANDUM

RE: People v. Paul R. Davenport and George Pritchard
Supreme Court, Kings County

The following is all that I can piece together from what I have learned from Davenport, the D.A. and other rather meager sources:

The crime is supposed to have taken place on April 3, 1967 at 12:00 noon at Top Notch T.V. Inc., store, 627 Wilson Avenue, Brooklyn, New York.

According to the newspaper article, the defendants were accused of raping a 44-year old Brooklyn housewife and robbing her of $342.00 in the premises of her husband's radio and TV repair shop on Bushwick Avenue, in Brooklyn, while the wife was alone there on a Monday afternoon. The newspaper article accused Davenport of using a hammer on the complaining witness, apparently before the alleged sexual assault.

The complainant and alleged victim is Selda Arnold who lives with her husband Vincent Arnold at 775 McDonough Street, Brooklyn. The money order allegedly stolen was drawn on U.S. Navigation Co. Inc., 116 East 16th Street, New York, New York.

I understand that the complainant is a white woman who is married to a negro man. My sources - pure rumor - - indicate that she has exhibited somewhat disturbed mental and emotional characteristics and has obtained a reputation in the neighborhood as a rather strange person.

The precinct is the Ralph Avenue Station.

According to what Davenport told me at our first interview, he was in the company of various persons on April 3, 1967 and had nothing at all to do with the crimes.

Aside from what you find in his enclosed handwritten story, my notes from our first interview indicate that on April 3, he was with a friend, Andrew Bass, from about 8:30 until about 11:45 A.M.

Mr. Bass supposedly then lived at 194 McDonough Street, Brooklyn.

I understand that Bass now lives at 1811 Park Place, Brooklyn, New York, Telephone No. 346-8231.

He then went to Jamaica where he saw George Pritchard, Douglas Pritchard and Lawrence Tendle (phonetic). Just before going to Jamaica he had consecutively spoken to two neighborhood businessmen, one Harvey Collins on Underhill Street, and one "Ernie", who owns a restaurant on Stone Avenue and Somers Street.

The description of events in the notes in my file are somewhat different than what we find when we look at Davenport's "My Story". Since our original interview was at the pen in Court and conducted under pressure, I think we should rely on Davenport's written description for the facts.

According to the latter, Davenport left the house to go to Andrew (?Bass) and Doug's (?Pritchard's) house around 8:15 and arrived there around 8:45. On the way he met Bobby Hayens (telephone No. 365-5377) and stopped to talk to him for a few minutes. When Davenport arrived at Andrew and Doug's place he found Andrew, Richard Porter and George Pritchard. After talking for a while he left, went to the store and returned. At this point, Doug Pritchard and Bobby Hayens were there (as indicated below, I assume that the others who were previously there - were then also present). They talked and played cards. They also sent out for some drinks. Another fellow came in whose name was unknown to Davenport. He stayed at the apartment until about 11:45 A.M. Then Doug Pritchard, Richard Porter and Davenport left to go to Jamaica and the other fellows stayed in the apartment. (In referring to "the other fellow" I assume although it is not clear from his statement, that Davenport meant George Pritchard and Andrew Bass, Bobby Haynes and the unknown other person). Davenport, Doug Pritchard and Porter then walked down Rockaway Avenue. They met Mr. H. Collins, who ows a few

trucks, on the corner of Hull Street. Davenport asked him if he needed a good man for a job, and so on. Davenport was then kidding around with Richard, Porter and Douglas Pritchard. They were all together until about 12:15 P.M.

He stopped at Somers and Stone Avenue to get a soda and talked with Ernie and his wife. He asked Ernie how business was going, and other small stuff. Ernie knew Davenport and particularly knew Davenport's wife. Davenport left Ernie's store about 12:20 P.M. He then met a girl named Jill and her girlfriend and they proceeded with the men around the neighborhood until about 3:30 P.M., when Davenport went back to Brooklyn. He said that he then saw his wife and afterwards returned to Andrew and Doug's house.

(As I tried to make sense of the scraps of information that Davenport has produced, I realize that he needs to be reinterviewed. Unfortunately, I will not be able to do so until I return from vacation post-Labor Day. Perhaps you and/or Nagler or Kasanoff can do so in my absence).

The story Davenport has recollected concerning the events of April 4th when he was arrested have been realtively consistent at all times when he spoke to me. Davenport and George Pritchard were standing on a corner waiting for a bus to go to Davenport's house. They had been there about ten minutes. The bus stopped right across the street from the TV store they were later charged with having robbed. They got off the bus at Rockaway and Fulton, apparently somewhat short of Davenport's house, to see if they could pick-up some more cards players for the evenings festivities. They were walking down Rockaway Avenue between Paul Street and McDonough Street when a car came up and Davenport noticed someone waving a hand at them. They thought the people were lost and wanted advice so they walked up to the car. This was about 7:00 P.M.

A lady, who turned out to be the complaining witness, was in the car with a man, who turned out to be her husband. Davenport told me orally that she stated "You robbed my store", at which time her husband pointed a rifle at them. According to his wirtten story, it was the man who accused them of robbing the store and hitting his wife. Davenport says he was afraid of the possibility of getting shot; called a policeman over who had just passed by and asked for assistance. The lady insisted that they be arrested for robbing the store and they were brought down to the station house.

According to Davenport, the rape story was not mentioned in any way at the early stages of the story, but was something the lady cooked up after they were at the precinct for some time.

I enclose a self-explanatory letter to Davenport's mother. I understand from the family that Mrs. Davenport's daughter, Ruth Carol, who lives at home with her mother and father, also knows Ernie - - the candy store man - - and is ready to go along with you to speak to him. Mrs. Davenport only asks that she be called in advance so that they can set aside the time. The home phone is 257-0389.

General information about Davenport: He was 23 years of age, having been born March 24, 1944. He is married and has two children, ages 5 and 4. His wife's name is Cora. She is approximately 22 years of age. He is separated from her.

Before his arrest he lived at 115 Liberty Avenue, Brooklyn. His wife now lives with her mother, Alma Kaine, 659 South 2nd Street, Plainfield, New Jersey.

I thought Davenport at first told me that he had been separated from his wife at the time of the alleged crime and that they were no longer living together. However, I may have confused the source of

this information because my notes indicate that I also learned from Mrs. Davenport, the defendant's mother, that Paul and his wife had been separated for about a month around the time of the alleged crime. Apparently, this was an amicable separation born out of his wife's desire for better living quarters and better environment for the children.

I go into such lengthy explanation because of Davenport's story to the effect that he had seen his wife some time during the afternoon of April 3rd.

Supposedly, Davenport was working part time for Red Star Beverages on Watkins Street, Brooklyn, a company with which his father has been employed for a number of years. The elder Mr. Davenport confirmed the fact that Paul was working as a helper with the Company three or four days a week.

* * * * * *

We are of course most interested in getting the stories of the alibi witnesses. However, we are also very interested in checking the background of the complaining witnesses.

Good luck.

File B. Barrow (Personal)

934 Bronx Park So.
Apartment 3D
Bronx, New York

Human Rights Commission
80 Lafayette
New York, New York

Attention: Mrs. Withey

Dear Mrs. Withey:

During the last part of May, 1967 I visited the apartment located at 1064 Carroll Place in the Bronx which at that time was available for rent. I left a deposit in the amount of $50.00 and a couple of days later visited the landlord. Mr. Schack refused to rent the subject apartment the following day. I filed a complaint with your agency, stating that his refusal was an act of discrimination.

It has just recently been brought to my attention that Mr. Schack has rented the subject apartment to another Negro family. On this basis I withdraw the complaint and request the Human Rights Commission to halt any further action on this complaint. This request is the advice of my lawyer, Mr. Steven Nagler, 150 Nassau Street, New York.

It is also requested that the enclosed letter be attached to the Human Rights Commission copy of the minutes of the Hearing and other material concerning the subject complaint.

If any further information is necessary, please do not hesitate to contact the undersigned or her attorney. Mr. Nagler.

Very truly yours,

(Mrs.)Bonnie Barrow

COPY

TO: Human Rights Commission
80 Lafayette
New York, New York

FROM: Bonnie Barrow

REFER TO: Complaint Bonnie Barrow vs. Schack, Nortmann et al.

During the hearing Barrow vs Shack, Nortmann et al held in June 1967, the testimony regarding a check dated April 7, 1967 made to the order of Sidney Rodwin with April written in the upper left hand corner, signed by the undersigned deserves further clarification. The date of April was written to make clear the period for the payment for which the check was being used.

The check dated April 7, 1967 was for the month of April not the month of March. The receipts held by the undersigned clearly show that the amount of money paid to Sidney Rodwin made the total of the amount of money due to Sidney Rodwin from February to May 1967.

The undersigned upon examining her receipts prior to a hearing in Civil Court (Landlord - Tenant) in June 1967, noticed that she was in possession of two payments for March 1967, a receipt for cash and a cancelled check for $110.00 dated April 7, 1967 with March in the corner. In order to make clear her records for presentation for the civil court hearing Barrow vs Rodwin, she wrote April in the corner of the subject check, which was in fact the payment for her April rent.

When the undersigned was questioned as to whether or not the check had been changed, in her state of anger resulting due to the invasion of privacy of having her bank account subpoened as well as being called and referred as a foreger by Mr. Schack's lawyer stated indignantly that the check was the same as it was when it was presented to Sidney Rodwin.

During the questioning the only meaning the alteration had to the undersigned was that she had made the alteration in order to make clear the time of April when the rent was paid rather than the change from the month of March on the check which was incorrect in the first place.

The testimony contained in the minutes of the hearing was not a deliberate attempt to falsify any statement or document by any means. It was very misleading and will continue to be without this explanation.

It was not until August 8, 1967 when a Human Rights Commissioner permitted me to read the minutes did the undersign realize how misleading as well as inaccurate the information was during that part of her testimony.

For this reason, it is requested that this correspondence be attached to the minutes of the hearing and any other information pertaining to the subject complaint.

The undersign would request another hearing with witnesses, if the subject apartment were still available; however since it has been rented, she feels that this enclosure serves in the best interest of all concerned.

Bonnie Barrow
934 Bronx Park South Apt 3D
Bronx, New York

FURNISH CFN

TELEGRAM RECEIVED BY TELEPHONE $ S E

WESTERN UNION TELEGRAPH CO.
CONFIRMATION OF MESSAGE FILED BY PHONE

095

BOB CARSON

BROOKLYN CORE
1233 FULTON ST N Y Y

DEAR SONNY CAN'T PROCEED WITH PRITCHARD AND DAVENPORT CASE UNTIL PRITCHARD'S BROTHER CALLS MYRON BELDOCK AT PL2 2299 MONDAY. YOUR HEL P URGENTLY NEEDED

STEVE NAGLER

WU 550 (1-52)

DATE 30 AUG 4 1255P EDT

CHECK 23 PD

TEL. NO. 964-8210

DEST'N BKLYN 08

SIGNATURE STEVE NAGLER

CFN FURN SCHOLARSHIP
EDUCATIONAL AND DEFENSE
FUND FOR RACIAL EQUALITY
150 NASSAU ST RM 1030
NEW YORK NY

Name & Address of victims

1. Selda Arnold, 775 McDonough St., Bklyn.
2. Vincent Arnold " " "
   U.S. Navigation Co Inc
   116 E 16th St., N.Y. N.Y.

Crime date & time.

2. 4/3/67 - 12 noon

3. Place of crime
   -627 Wilson Ave - Top Notch TV INC.

4. Weapon - one hammer

MSS SEDFRE
-566

DAVIDMAN, LEONARD et al. VS. SOUTH CAROLINA 1965-1966
(CONTRIBUTING to DELINQUENCY of MINOR)

Box 36
Folder 10

State Historical Society of Wisconsin

Please Retain Original Order

JAN 19 1965

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

****

MOTION TO REMOVE

****

Leonard Davidman
et. al.

against

The State of South Carolina

****

PETITIONERS MEMORANDUM

****

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

SUMTER, SOUTH CAROLINA

MATTHEW J. PERRY

COLUMBIA, SOUTH CAROLINA

CARL RACHLIN

NEW YORK, NEW YORK

ATTORNEYS FOR PETITIONERS

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QUESTIONS INVOLVED

Question I

Whether or not the allegations conatined in Petitioners Petition sufficient to give federal court jurisdiction under the Provisions of 28 U.S.C. 1443 (1).

Question II

Whether or not the allegations contained in Petitioners Petition sufficient to give federal court jurisdiction under the Provisions of 28 U.S.C. 1443 (2).

DISTRICT COURT

Leonard Davidman et al. v. The State of South Carolina

STATEMENT

This is a Petition to remove from the Jurisdiction of the Court of General Sessions for Dorchester County a Criminal Action brought in the Town of St. George against Petitioners to the District Court for the District of South Carolina.

Petitioners were charged with the violation of Section 16-555.1, Code of Laws of South Carolina, 1962. The charge arose out of Petitioners participation with several other persons of school age in a picket on or near the Williams Memorial School, a co-educational high school attended by Negroes in St. George, South Carolina.

During the entire time that picket was being conducted, representatives from the local County and City law enforcement divisions were present; also, a representative from the State law enforcement division was present. At the beginning of this picket, the group was upon the property of the Williams Memorial School. After a short while the Sheriff of Dorchester County directed group that they could not picket and sing on the school property, but would have to use the adjacent street; further, that they would have to lower their voices. This the picketers proceeded to do. They continued to picket and sing for more than an hour without any direction from any law enforcement agent present. After picketers finished picketing they went their several ways.

On the day following the day of picketing, (December 2, 1965), these Petitioners were arrested for contributing to the delinquency of minors, in violation of Section 16-555.1, Code of Laws of South Carolina, 1962.

The participants in the picket other than Petitioners were charged with violation of Section 16-551, Code of Laws of South Carolina and found guilty of the charges against them in the Magistrate's Court for Dorchester County. Petitioners were placed in the local jail under $5,000.00 bond. A petition for removal, a Writ of Habeas Corpus and a Motion for leave to proceed in forma paupereis were filed with this Court by counsels for Petitioners. This Court upon a conference reduced bail to the amount of $1,000.00 each.

An evidentraty hearing was held before this Court on January 6, 1966. While this Court ruled as a matter of law that no jurisdiction could be shown under 28 U. S. C. 1443 (2), counsels maintains their position to

the contraty, and therefore encompasses an argument upon the point in this memorandum, with the hope that this Court might reconsider its position.

DISTRICT COURT

Leonard Davidman et al. v. The State of South Carolina

Legislative History of 28 U. S. C. Section 1443

In order to point out in the clearest fashion possible the scope of 28 U. S. C. 1443 as it applies to Petitioners Petition, its legislative background is presented.

Increasingly since the inception of Government, federal removal jurisdiction has been expanded by the Congress[1] to protect National interest in cases "in which the State tribunals cannot be supposed to be impartial and unbiased,"[2] for history has increasingly taught the wisdom of Hamilton's insight: "The most discerning cannot foresee how far the prevalency of a local spirit may be of national causes..."[3] In the Constitutional Convention Madison pointed out the need for such protection just before he successfully moved the Committee of the Whole to authorize the national legislature to create inferior federal courts.[4]

Mr. Madison observed that unless inferior tribunals were dispersed throughout the Republic with final jurisdiction in many cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a remedy. What was to be done after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial at the supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court. An effective Judiciary establishment commensurate to the legislative authority, was essential.

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[1](See Hart & Wechsler, The Federal Courts and The Federal System 1147-1150 (1953).

[2]The Federalist, No. 80 (Hamilton) Warner, Philadelphia ed. 1818), at 439.

[3]Id., at 439.

[4]1 Farrand, The Records of The Federal Convention of 1787, at 125 (1911). Mr. Wilson and Mr. Madison moved the matter pursuant to a suggestion of Mr. Dickinson.

A Government without a proper Executive and Judiciary would be the mere trunk of a body without arms or legs to act or move.[5]

The Early Congresses made very sparing use of the power which was thus given them by the Constitution; during nearly three quarters of a century following the Judiciary Act of 1789,[6] they acted largely on the principle "that private litigants must look to the state tribunals in the first instance for vindication of federal claims, subject to limited review by the United States Supreme Court."[7] The federal trial courts were employed only for the limited federal specialties; no general federal question jurisdiction was created.[8] Original civil diversity jurisdiction was given[9] responding then, as today, to "the possible shortcomings of State justice," particularly the localization of trial in parochial communities where "justice is likely to be impeded by provincialism of the local judge and jury, the tendency to favor one of their own against an outsider, and the machinations of the local 'court house gang'[10] - and civil removal jurisdiction was given in three sorts of cases[11] where it was particularly feared that local prejudice might impair national concerns. In criminal cases, however, the federal trial courts were entirely excluded from incursion into state proceedings, section 14 of the Judiciary Act expressly excepted state prisoners from the federal habeas corpus authority.[12]

Experience soon showed, however, the potential of the state criminal process for destruction of vital national concerns. Congress responded with limited grants of federal court jurisdiction, in removal and habeas corpus.

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[5]Id. at 124.

[6]Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

[7]Hart & Wechsler, The Federal Courts and The Federal System 727 (1953).

[8]Except by the Federalist Act of Feb. 13, 1801, ch. 4, 11, 2 Stat. 89 92, quickly repealed by the Act of March 8, 1802, ch. 8, 2 tat. 132.

[9]Act of Sept. 24, 1789, ch. 20, 11, 1 Stat. 78.

[10]ALI Study of The Division of Jurisdiction Between State and Federal Courts, Commentary, Diversity Jurisdiction, at 41 (Tent. Draft No. 1, 1963).

[11](The Act of Sept. 24, 1789, ch. 20, 12, 1 Stat. 79).

[12]Except where it was necessary to bring them into court to testify. Act of Sept. 24, 1789, Ch. 20, 1 Stat. 81.

In 1815,[13] confronted by New England's resistance to the War of 1812, Congress in a customs act allowdd removal of suits or prosecutions against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeable to the provisions of this act, or under colour thereof, for any thing done by virtue of this act, or under colour thereof.[14]

In 1833, confronted by South Carolina's opposition to the tariff, [15] Congress enacted the famed Force Act, giving the President extensive power to use the military forces of the United States to protect federal customs officers and suppress resistance to the custom laws;[16] extending the civil jurisdiction of the federal courts to all cases arising under the revenue laws; authorizing removal of any suit or prosecution against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under colour thereof, or on account of any right, authority, or title, set up or claimed by such officer, or other person under any such law of the United States;[17] and adding to the federal habeas corpus jurisdiction power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof.

The Act's evident purpose was to exclude state court jurisdiction in cases affecting the tariff, and to give the federal courts plenary power to enforce the tariff against concerted state resistance, including state judicial resistance: It was "apparent that the constitution of the courts in South Carolina makes it necessary to give the revenue officers the right to sue in the federal courts."[18]

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[13] See 1 Morison & Commager, "Growth of the American Republic", 426-29 (4th ed. 1950).

[14] Act of Feb. 4, 1815, ch. 31, 8, 3 Stat. 633.

[15] See 1 Morison & Commager, op. cit., supra, note 35, 475-85.

[16] Act of March 2, 1833, ch. 57, 1, 5, 4 Stat. 632-34.

[17] Id. ch. 57, 3, 633.

[18] Cong. Deb. 260 (Jan. 29, 1833).

The federal habeas corpus jurisdiction was extended again in 1842 to authorize release of foreign national domiciliaries held under state law or process under color of foreign authority depending on the law of nations.[19] This extension was occasioned by the McLeod case,[20] in which the New York courts nearly provoked an international incident by refusing to relinquish jurisdiction over a British subject held for murder who claimed that the acts with which he was charged were done under British authority. McLeod was acquitted at his trial, but the need for an expeditious federal remedy to short-cut the state court process in such cases was strongly felt: "If satisfied of the existence in fact and validity in law of the plea in bar, the federal jurisdiction will have the power of administering prompt relief."[21] Again, as in 1815 and 1833, the scope of federal intrusion was narrow.

But the Civil War and its aftermath changed the congressional temper sharply. During and after the War, Congress multiplied the uses of the federal courts and, in particular, their uses to anticipate the state criminal process. By the Habeas Corpus Suspension Act of 1863[22] it immunized from state civil and criminal liability persons making searches, seizures, arrests and imprisonments under presidential orders during the existence of the rebellion; to insure this protection, it provided in section 5 of the Act as follows: For removal of all suits and criminal prosecutions against any officer, civil or military, or against any person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any Act of Congress.[23]

The debates preceding passage of the Act reflected congressional concern that federal officers could not receive a fair trial in hostile state courts, and that the appellate supervision of the Supreme Court of the United States would be inadequate to rectify the decisions of lower state tribunals having the power to find the facts.

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[19] Act of August 29, 1842, ch. 257, 5 Stat. 539.

[20] See People v. McLeod, 25 Wend. 482 (Sup. Ct. N. Y. 1841)

[21] Senator Berrien, at Cong. Globe, 27th Cong., 2d Sess. 444 (4/26/42).

[22] Act of March 3, 1863, ch. 81, 12 Stat. 755.

[23] 12 Stat. 756.

In 1864 and 1866, Congress also extended the customs-officer removal provisions of the 1833 Force Act to cover civil and criminal cases involving internal revenue collection. In their final 1866 form, these provisions of authorized federal removal of suits and prosecutions "against any officer of the United States appointed under or acting by authority of (the revenue laws)...or against any person acting under or by authority of any such officer on account of any act done under color of his office, or against persons claiming title from such officers, where the cause concerned the property and affected the validity of the revenue laws."

During the first months of the Thirty Ninth Congress, Union military commanders in the defeated South transferred from the state courts to national military tribunals civil and criminal jurisdiction over cases involving Union Soldiers, loyalists and Negroes. Recognizing the wisdom of this transfer, and intensely aware of the hostility and anti-Union prejudice of the Southern state courts, whose process was being used to harass the unionists and freedmen, that Congress took four important steps to curb the state courts.

First, by the Amendatory Freedmen's Act,[24] it approved and expressly authorized the supersession of the state courts by Union military tribunals throughout the South until the rebellious States were restored to order and their representatives readmitted to Congress. In this, the Thirty-Ninth Congress-like the military commanders before it intended that nationally responsible courts should sit at the trial level, so that the unionists and freedmen might be protected not only against explicitly discriminatory Southern state statute law apparently fair on its face.[25]

Second, the same Congress substantially amended the removal procedures under the Habeas Corpus Suspension Act of 1863, supra, in order to prevent their obstruction by the state courts, The Act of May 11, 1866, chapter 80[26] facilitated removal practice; the Act of February 5, 1867, chapter 27,[27] authorized the issuance of writs of habeas corpus cum causa by the federal courts to bring before them any imprisoned defendants whose cases had been removed.[28]

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[24]Act of July 16, 1866, ch. 200, 14, 14 Stat. 176.

[25]Particularly significant is an order of General Terry in Virginia March 12, 1866, set out at Cong. Globe, 39th Cong., 1st Sess. 1834 (4/7/66).

[26]14 Stat. 46

[27]14 Stat. 385.

[28]The act was reported by the Judiciary Committee in each house. Cong. Globe, 39th Cong., 1st Sess. 4096 (July 24, 1866) (House) 4116 (Senate)

The debates on the first of these remedial enactments are particularly revealing; they demonstrate beyond peradventure Congress' distrust of, and unwillingness to leave the vindication of federal interest to the state judiciary.

> Now, it so happens, as the rebellion is passing away, as the rebel soldiers and officers are returning to their homes, that I may say thousands of suits are springing up all through the land, especially where the rebellion prevailed, against the loyal man of the country who endeavored to put the rebellion down.[29] "Suits are springing up from one end to the other; and these rebel courts are ready to decide against your Union men and acquit the rebel soldier,"[30] A great many vexatious suits have been brought, and they are still pending, and instances have been known they exist now where Federal officers have been pushed very hard and put to great hardships and expense, and sometimes convicted of crime, for doing things which were right in the line of duty, and which they were ordered to do and which they could not refuse to do.[31] In Kentucky "they are harassing, annoying, and even driving out of the State the men who stood true to the flag by suits under the legislation and judiciary rulings of Kentucky. There no protection is guaranteed to a Federal Soldier."[32] "In another county of that State the grand jury indicted every Union judge, sheriff, and clerk of the election of August, 1865. In addition to that every loyal man who had been in the Army and had, under the order of his superior officer, taken a horse, was indicted."[33] Discrimination against the Union men "is the rule in Kentucky, except in one solitary district, and the Legislature at its last session inaugurated means of removing that judge, simply because he dared to carry out this act of the Federal congress (the 1863 removal stature).[34] "There must be some way of remedying this crying evil, and these men who have been engaged in the defense of the country cannot be permitted to be persecuted in this sort of way. Their life becomes hardly worth having, if, after having driven the rebels out of their country and subdued them, those rebels are to be permitted to return and harass them from morning until night and from night till morning, and make their life a curse for that very defense which they have given your country."[35]

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[29]Cong. Globe, 39th Cong., 1st Sess. 2021 (April 18, 1866) (remarks of Senator Clark).

[30]Id. at 2021 (April 20, 1866) (remarks of Senator Clark).

[31]Id. at 1880 (April 18, 1866) (remarks of Senator Clark).

[32]Id. at 1526 (March 20, 1866) (remarks of Representative McKee, of Kentucky).

[33]Id. at 1526 (March 20, 1866) (remarks of Representative McKee, of Kentucky).

[34]Id. at 1526 see id. at 2063 (April 20, 1866) (remarks of Senator Clark).

[35]Id. at 2054.

Third, the Thirty-Ninth Congress extended the federal habeas corpus jurisdiction to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States..."[36] made elaborate provision for summary hearing and summary disposition by the federal judges, and provided that:

> Pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharging in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.[37]

This statute was designed "to enlarge the privilege of the writ of habeas (sic) corpus, and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them,"[38] to give any person "held under a State law in violation of the Constitution and law of the United States."[39] It was legislation...of the most comprehensive character (bringing)...within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."[40] Recent exhaustive study of the history of the 1867 habeas corpus statute confirms that its purpose was to give a summary and imperious federal judicial procedure for the pretrial abortion of state criminal proceedings,[41] and thoroughly supports this Court's observation that "Congress seems to have had no thought...that a state prisoner should abide by state court determination of his constitutional defense-the necessary predicate of direct review by (the Supreme Court)... before resorting to federal habeas corpus.

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[36] Act of February 5, 1867, ch. 28, 14 Stat. 385.

[37] Act of February 5, 1867, ch. 28. 28, 1. 14 Stat. 386. The successor

[38] Cong. Globe, 39th Cong., 1st Sess. 4151 (July 25, 1866) (remarks Representative Lawrence, who reported the bill and was its manager in the House).

[39] Id. at 4229 (July 27, 1866) (remarks of Senator Trumbull, Chairman of the Judiciary committee, who reported the bill and was its manager in the Senate, id. at 4228).

[40] Ex parte McCardle, 73 U. S. (6 Wall.) 318, 325,26 (1868).

[41] Amsterdam, Criminal Prosecution Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113, U. PA. L. Rev. 793 (1965).

Rather, a remedy almost in the nature of removal from the state to the federal court of state prisoners' constitutional contentions seems to have been envisaged. Fay v. Noia, 372 U. S. 391, 416 (1963). See also, In re Neagle, 135 U. S. 1 (1890).

Fourth, and most significant, on April 9, 1866, Congress enacted the first major civil rights act.[42] Its third, section the ancestor of the present 28 U. S. C. 1443 (1958), on which defendants rely to sustain removal, provided:

> Section 3. And it further enacted, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this Act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedman and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof.

The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil and criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment of the party found guilty.[43]

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[42]Act of April 9, 1866, ch. 31, 14 Stat. 27.

[43]Act of April 9, 1866, ch. 31, 3, 14 Stat. 27.

The purpose of this 1866 act--"An Act to protect all persons in the United States in their Civil Rights and to furnish the Means of their Vindication" - was to upset the Dred Scott decision[44] by declaring the Negroes citizens, to establish as an incident of that citizenship "the same right" to contract, hold property, etc., and "to full and equal benefit of that "right" (section 1),[45] to deter by criminal penalties the deprivation of that "right" (section 2),[46] and to give the Negroes access to federal courts for protection of the right (section 3).[47] The structure of section 3 was: (1) to create original federal jurisdiction in the cases of persons who were denied or could not enforce their l rights in the state courts; (2) to create removal jurisdiction in cases where any "such person" was sued or prosecuted in a state court; and (3) to create additional removal jurisdiction over suits or prosecutions against persons on account of alleged wrongs committed under color of the 1866 act or the Freedmen's Bureau Acts. Little appears in the legislative history, however, that is helpful in precise construction of any of these jurisdictional grants.[48] Since the basic substantive right given by section 1 of the act was a right of equal treatment under state laws and proceedings, it was an obvious shorthand description of the scope of section 3 to say that it covered "the cases of persons who are discriminated against by State laws or customs,"[49] persons "whose equal civil rights are denied...in the State courts,"[50] and these were the expressions used by Senator Trumbull, who more than any other one man was the guiding force behind the Civil Rights Act,[51] and who gave the only systematic exposition of its judiciary provisions found in the debates.[52]

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[44]Scott v. Sandford, 60 U. S. (19How.) (1857).

[45]Act of April 9. 1866, ch. 31, 1, 14 Stat. 27, provided:

[46]Act of April 9. 1866, ch. 31, 2, 14 Stat. 27.

[47]Act of April 9, 1866, ch. 31, 3, 14 Stat. 27.

[48]Except for the words which now appear as the last clause of 28 U. S. C. 1443 (2) (1964).

[49]Id. at 475 (Jan. 29, 1866). There was no other pertinent discussion of the provision.

[50]Ibid.

[51]Id. at 129.

[52]Cong. Globe, 39th Cong., 1st Sess. 1759 (April 4, 1866).

In the context of Congress' concern with the substantive question of denials of equality, this language plainly does not mean that the removal jurisdiction depended upon a showing of actual denied or discrimination by the state courts: the very text of the statute reaches prosecutions brought against persons "who are denied" and those who "cannot enforce" their rights in the state tribunals. In any event, it is plain that Trumbull was summarizing only part of the jurisdiction granted by section 3: the jurisdiction under the clauses affecting persons "who are denied or cannot enforce" their federal claims (now 28 U. S. C. 1443 (1)(1964). The jurisdiction over persons acting "by virtue or under color of authority" of the 1866 Act or the Freedmen's Bureau Acts (now 28 U. S. C. 1443 (2) (1964), remains unilluminated.

However, one point does emerge clearly from the debates and from the original statutory language. Contrary to the construction which this Court was subsequently to put on the "denial" clause (present 1443 (1) in a series of cases between Virginia v. Rives, 100 U. S. 313 (1880), and Kentucky v. Powers, 201 U. S. 1 (1906), see pp. 74-85, infra, Congress did not intend that removal be allowed only where state statutory law was federally protected rights. Certainly it is true that Southern resistance to the Thirteenth Amendment first took the form of Black Codes-statutory regulations directed expressly against the freedman.[53] It is also true that a major purpose of the act of 1866 was to counteract the Black Codes,[54] and although the Rives-Powers doctrine was never put on this ground by Court, congressional concern over the codes might be thought to support the doctrine. It does not, for several reasons.

First, the Black Codes were viewed by the 1866 Congress as overwhelming evidence that the Southern States, unless restrained by the federal government, would discriminate against the Negro and deprive him of his rights; in this light they were discussed as proof of the need for federal action, but not as its exclusive target.[55]

---

[53]For typical Black Code provisions, see 2 Commager, Documents of American History 2-7 (6th ed. 1958).

[54]The Codes were often referred to in debate. In the Senate: Cong. Globe, 39th Cong. 1st Sess. 474 (Jan. 29, 1866).

[55]See portions of the debates cited in note 87 supra, especially Cong. Globe 39th Cong., 1st Sess. 603, 605, 1118, 1160.

Plainly, Congress anticipated massive Southern resistance to the Thirteenth Amendment, resistance not alone by legislation but by every means at Southern state command.

> It was easy to foresee, and of course we foresaw, that in case this scheme of emancipation was carried out in the rebel States it would encounter the most vehement resistance on the part of the old slaveholders. It was easy to look far enough into the future to perceive that it would be a very unwelcome measure to them, and that they would resort to every means in their power to prevent what they called the loss of their property under this amendment. We could foresee easily enough that they would use, if they should be permitted to do so by the General Government, all the powers of the State governments in restraining and circumscribing the rights and privileges which are plainly given by it to the emancipation Negro.[56]

Second, the Black Codes which concerned Congress were not all discriminatory and hence unconstitutional[57] on their face. Much mention was made in the debates of the Southern vagrancy laws[58] and particularly of the vagrancy law of Virginia,[59] for example, which was a color-blind statute[60] whose evil lay in its systematically discriminatory application to the Negores.[61]

Third, there is affirmative evidence that Congress was aware of and intended to redress nonstatutory denials of federal constitutional rights. Senator Trumbull told the Senate in his principal speech urging passage of the bill over President Johnson's veto:

> In some communities in the South a custom prevails by which different punishment is inflicted upon the blacks from that meted out to whites for the same offense. Does (section 2 of the 1866 act)...propose to punish the community where the custom prevails?.
>
> Or is it to punish the person, who under color of the custom, doprives the party of his right? It is a manifest perversion of the meaning of the section to assert anything else.

---

[56] Id. at 503 (Jan. 30, 1866) (remarks of Senator Howard).

[57] The legislators who enacted the 1866 act regarded discriminatory legislation as unconstitutional by force of the thirteenth amendment.

[58] See, e. g., Cong. Globe, 39th Cong., 1st Sess. 1123-34 (March 1, 1866) remarks of Representative Thayer).

[59] Id., at 1160 (March 2, 1866) (remarks of Representative Windom), 1759 (March 4, 1866) (remarks of Senator Trumbull).

[60] See Acts of Virginia, 1865-66, at 91 (1866) (Act of Jan. 15, 1866).

[61] Cong. Globe, 1st Sess., 603 (Feb. 2, 1866). Terry's order is found in McPherson, op. cit. supra note 86 at 41-42.

Congress, enacted criminal removal statutes in 1863 and 1866 covering cases arising out of the Civil War, in 1864 and 1866 covering cases arising out of the enforcement of the Wartime Revenue Acts, in 1866 covering cases of all persons prosecuted for acts under color of authority of Civil Rights law and all persons who could not enforce their newly given Civil Rights in the state courts, in 1871 covering voting enforcement cases plainly, it seemed that the Reconstruction Congress had accomplished their principal nationalizing purpose: the effective protection of freedoms won in battle and several against state action by the Post-War constitutional amendments and statutes, through the extension of the sheltering arm of a plenary federal trial court jurisdiction.

ARGUMENT

Question I

Whether or not the allegations contained in Petitioners Petition sufficient to give federal court jurisdiction under the Provisions of 28 U. S. C. 1443 (1).

Admittedly it appears from Strauder v. West Virginia, 100 U. S. 303 (1880), through Kentucky v. Powers, 201 U. S. 1 (1906), and even since that the courts have made removal under section 1443 (1) allowable only on a showing of facial unconstitutionality of a state statute or constitutional provision. Yet, as we consider the history of this legislation, there is not even a vague suggestion that such a construction was intended. Experience has not suggested that statutory denials of federal civil rights are more numerous or more grievous than non-statutory denials; to the contrary, as Senator Dodd recently put it, "by far the most serious denials of equal rights occur as a result not statutes which deny equal rights upon their face, but as a result of unconstitutional and invidiously discriminatory administration of such statutes."[62] It might be argued that where one removes an action to the federal district court the judge of such court should take evidence on the issue of the actual probability that the state judges would disobey the supremacy clause, or otherwise would not fairly entertain defendant's federal claims. This is an impossible absurdity. For how could any judge make such a speculative finding. At the same time, we have a provision allowing removal before trial.

There appears much hope for a realistic and proper oonstruction of this section in Rachel v. Georgia, 342 F. 2d 336 (5th cir. 1965), Peacock v. City of Greenwood, 347 F. 2d 679 (1965), and N.A.A.C.P. v. Button, 371 U. S. 415, 433, (1963). In the Rachel case the Court held that persons prosecuted for exercising their right to equal accommodations under the Civil Rights Act of 1964 are thereby denied and unable to enforce those rights, within the meaning of section 1443 (1), notwithstanding the statutes underlying the prosecutions are not unconstitutional on their face and the state courts are not alleged to be unfair.

---

[62] 110 Cong. Rec. 6955 (April 6, 1964).

In the Peacock case the facts were similar to those of the case before us. There was a state statute prohibiting the obstruction of a public street. The defendants were persons assisting in a Voter Registration drive and were so doing when arrested. The statute was alleged to be vague indefinite and unconstitutionally applied, and that arrests of the workers would prevent them from exercising their First and Fourteenth Amendment freedoms of speech, assembly and petition. The Court, after considering the cases from Strauder to New York v. Galamison, 342 2d. 255. (1965) said, "we find nothing in the prior decisions of the Supreme Court, nor in the language of section 1443 itself, to require limitation of that section to cases involving laws violative of equal rights on their face."

The Fifth Circuit is not alone in its reasoning. In the Button case a suit was brought by the State of Virginis against petitioners for violation of recently enacted Barratry and Champerty legislation. The question in that case was whether or not the legislation within itself or as applied violated the First and Fourteenth Amendments to the United States Constitution. The Supreme Court of the United States concluded that the statutes in their application violated the First and Fourteenth Amendments. It had this to say:

> "We meet at the outset the contention that 'solicitation' is wholly outside the area of freedoms' protected by the 1st Amendment. There are two answers to this contention. The first is that a state cannot foreclose the exercise of Constitutional rights made by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects; the 1st Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion."

The petitioners in this case also contended that the statute (section 16-555.1), Code of Laws of South Carolina, 1962, was void for vagueness. Again we refer to the Button case; on that point the Court said, "for standards of permissible statutoty vagueness are strict in the area of free expression." In Marcus v. Search Warrant, 367 U. S. 717, 733, the Court pointed out that, "the objectionable quality of vagueness and overbreath does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of 1st Amendment freedoms, the existence of a penal statute suceptible of sweeping and improper application." The Court reasoned similarly in Cantwell v. Conn., 310 U. S. 296, 311, and Gremilion v. N.A.A.C.P., 366 U. S. 293 (1961).

Therefore, as to the question raised at this point, it is petitioners position that it is not necessary to show that the allegedly unconstitutional statute is unconstitutional on its face in order for section 1443 (1) to attach.

It is our position that it impossible for any judge to make a factual determination as to whether one may or may not receive a fair trial on the state level even though dozens of instances can be shown where the stage court ruled against the defendant in similar cases, and such cases were reversed on the federal level. And, though dozens of statutes of the state on their faces support and require a continuing custom of racial segregation. And, though many instances of hostility were shown in the community where defendants are to be tried. It is our further position that the evidentiary hearing before this Court to determine whether Petitioners could show a sufficient number of instances to warrant a conclusion that the Petitioners could or could not enforce their rights in the state court should have been a hearing to determine whether the statute as applied deprived or tended to deprive, Petitioners of their federally protected rights or was vague and indefinite to the extent of constituting an encroachment or a possible encroachment upon federally protected rights providing for equal protection.

Question II

Whether or not the allegations contained in Petitioners Petition sufficient to give federal court jurisdiction under the Provisions of 28 U.S.C. 1443 (2).

At the outset, we wish to raise the question - what acts may citizens normally do under color of authority? This may be answered by saying that a citizen may choose his religion, choose his job, choose his home and choose his friends. This is true because there is some constitutional or statutory provision which states that he can do these things by implication or in fact. Of course, in so doing he may contravene some other constitutional or statutory provision, but there still would exist a color of authority. As a definition, we might say that one acts under color of authority of a law when his conduct thereunder is protected by that law. In contradistinction, we may say that any act done not under any law or color thereof is illegal. In the case of People of State of New York v. Galamison, 342 F. 2d 255 (1965), the court hinted that for a case where this section is to come into play, there need be some showing of self-help. This position would seem to create an active v. passive exercise of rights protected by laws providing for equal rights. Conceding this position, what could be more self help than actively participating in a program designed to bring about equality and justice.

Revisiting our legislative history of section 1443, it strongly appears that the 1875 revisers used the phrase "any law providing for equal rights" as a shotthand technique for referring to all the three previous civil rights acts, the Civil Rights Act of 1866, the Civil Rights Act of 1870 (Sections 16 & 17 which are now 42 U.S.C. 1981 and 1982), and the Civil Rights Act of 1871 (Section 1 of which is now 42 U.S.C. 1983), not to mention the Fourteenth Amendment.

The federal courts, under the 1866 Act as well as "and the other remedial laws of the United States Which are in their nature applicable in such cases" was a sufficient basis for the 1875 revisers and legislators to have believed or assumed that all of Section 3, including the removal provisions, of the 1866 act was already available to those who claimed that they were being prosecuted for exercising the rights protected under Section 1983;

and that by using the phrase "any law providing for equal rights" they would also be referring to this law. This argument could be further strengthened by the fact that the Second Civil Rights Act of 1870, which the majority recognizes as a "law providing for equal rights" within the meaning of 1443 (2), incorporated the removal provisions by a similar summary reference to the Act of 1866; the revisers and legislators might have assumed that if such a reference could make the removal provisions of the 1866 Act available in connection with the rights protected by the 1870 Act, the same would be true for the 1871 Act.

CONCLUSION

In conclusion, it is petitioners position that considering the history of removal legislation and the thrust of the "new look" particularly by the Fifth United States Circuit Court, with respect to this legislation, there exist strong and just grounds upon which this Court may find for the petitioners under 28 U.S.C. 1443 (1). As for Section 1443 (2), we can only say that while the history of the legislation has suggested no reason for so doing, the courts have taken out of context and given special or unusual meanings to otherwise common words. There also exist very ample grounds upon which this Court may find for petitioners under this section.

With regard to the evidentiary hearing before this Court on January 6, 1966, it is petitioners position that the necessary machinery to place petitions for removal in issue was never legally perfected, in that counsels for petitioners received the motion to remand or answer from the State on the date prior to the hearing. The requirement by the Honorable Judge Simons that petitioners proceed even in view of this fact left the petitioners helpless to controvert any grounds advanced to support the motion to remand. Moreover, at the evidentiary hearing petitioners produced three witnesses all of whom testified to acts of harassment and attitudes prevalent in Dorchester County which tends to support a claim that a fair trial could not be obtained. The State never in fact made a motion to remand. While we recognize that this Court will not permit mere irregularities to bar an otherwise valid pleading the substance of the pleading submitted by the State itself offers no assistance in determining its identity. Even more, the State did not see fit to introduce a sintilla of evidence to support its vague pleading. As to its third defense regarding the prematurity of the petition in view of the fact that there has been no grand jury indictment in the State Court, there appears nowhere in the removal statutes a requirement that an indictment be returned where the petition is one for removal before trial. We submit that the well established principle would apply; that is, when removed the District Court having jurisdiction for all purposes would proceed as if in continuation of the state action, Fed. Rules of Crim. Procedure 54 (b) (1); cf Fed. Rules of Civil Procedure 81 (c).

Finally, it is urged that this Court adopt the Fifth Circuit's view as to what constitute sufficient grounds to remove under Section 1443 (1). Adopting such position, Petitioners would be entitled to a new hearing as to whether the Statute was discriminatorily applied rather than whether the Petitioners might get a fair trial in Dorchester County.

Respectfully submitted,

Ernest A. Finney, Jr.
Sumter, South Carolina

Ruben L. Gray
Sumter, South Carolina

Matthew J. Perry
Columbia, South Carolina

Carl Rachlin
New York, New York

Attorneys for Petitioners.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

DEC 15 1965

LEONARD DAVIDMAN AND
NATHANIEL LEE,

Petitioners,

versus

THE STATE OF SOUTH CAROLINA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioners Leanord Davidman and Nathaniel Lee, because of their poverty as shown by the verified petition for Writ of Habeas Corpus herein, move the Court for a leave to file the Petition for Writ of Habeas Corpus without prepayment of costs and for leave to proceed in forma pauperis.

ERNEST A. FINNEY, JR.
Sumter, South Carolina

RUBEN L. GRAY
Sumter, South Carolina

MATTHEW J. PERRY
Columbia, South Carolina

CARL RACHLIN
New York, New York

By: Ernest A. Finney, Jr.
ERNEST A. FINNEY, JR.

Attorneys for Petitioners.

Sumter, South Carolina

December 11, 1965.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

LEONARD DAVIDMAN AND
NATHANIEL LEE,

Petitioners

versus

THE STATE OF SOUTH CAROLINA

Respondents

TO: The Honorable J. Robert Martin, Chief Judge, United States District Court for the District of South Carolina, Charleston Division

PETITION FOR REMOVAL AND FOR OTHER RELIEF

I

Your petitioners respectfully petition this Court, pursuant to Title 28 U.S.C., Section 1443, for the removal of cases styled, The State of South Carolina v. Leonard Davidman and The State of South Carolina v. Nathaniel Lee, from the Court of General Sessions of Dorchester County South Carolina to this Court. These proceedings are now pending and petitioners are awaiting trial in the General Sessions Court, County of Dorchester, State of South Carolina; said action is a criminal proceeding in which each petitioner is a defendant.

II

Each petitioner is charged in these criminal proceedings with the alleged offense of contributing to the delinquency of minors , in violation of Section 16-555.1, Code of Laws of South Carolina 1962.

III

Each petitioner is now confined in the County Jail of Dorchester County South Carolina, St. George, South Carolina pending posting a bond in the amount of $5,000.00 each or trial scheduled for April, 1966. The petitioners by reason of their economic condition are financially unable to meet the bond requirements as set by the state officials. Petitioners further aver that the bond as set is, under all the facts and circumstances of this case, harsh and excessive, and their present imprisonment operates to deprive them of their liberty in violation of their constitutional rights as protected by the Fourteenth Amendment to the United States Constitution.

IV

On December 1, 1965, petitioners Leonard Davidman and Nathaniel Lee walked with a group of students to the premises of the Williams Memorial School in St. George, South Carolina, where these students began to picket and sing songs on the premises of the Williams Memorial School. Approximately ten minutes after the students began picketing and singing songs on the school grounds the Sheriff of Dorchester County and other officials of the County and state told picketers that they could not picket on school grounds but would have to go into the street adjacent to the school property to continue their picketing activities. This instruction was followed by the picketers and they continued their picketing activities for approximately two hours, with the police officials of the town of St. George, County of Dorchester, and the State of South Carolina observing, without further incident. At this point the picketers and the petitioners left the scene of this activity and went their several ways.

V

The petitioners were arrested on December 2, 1965 on charges of contributing to the delinquency of minors in violation of Section 16-555.1, Code of Laws of South Carolina 1962. These charges were predicated upon the allegation in the warrants that petitioners had knowingly, unlawfully, willfully and feloniously contribute to the delinquency of minors attending Williams Memorial School at St. George, South Carolina by inciting monors not to attend school, singing and marching on and near the school grounds, and causing a general disturbance and being in a group of pickets.

VI

The acts for which petitioners are being held to answer as offenses, as described above, are, insofar as the offenses charged have any basis in fact, acts in the constitutionally protected exercise of petitioners right to freedom of speech, assembly, and petition, guaranteed by the United States Constitution, Amendments One, Fourteen, and 42 U.S.C. Section 1983 (1958). Insofar as the offenses charged againts the petitioners are based on allegations of conduct not protected by the Federal Constitution and laws, those allegations are groundless in fact. Conviction of petitioners on the charges against them will punish them for exercising rights, privileges, and immunities secured them by the Federal Constitution and laws, and will deter them from future exercise of these rights, privileges, and immunities.

VII

The South Carolina Statute under which the warrants charging petitioners were brought are unconstitutional as applied if they make petitioners conduct criminal, whereas, if the Statutes of South Carolina referred to herein are construed as to save their constitutionality under the Federal Constitution, there is no evidence upon which petitioners may be convicted consistent with due process of law and the equal protection of the law as required by the Fourteenth Amendment to the United States Constitution.

VIII

Section 16-555.1, Code of Laws of South Carolina 1962 is unconstitutional on its face in that it is vague, indefinite, and uncertain. It fails to adequately apprise petitioners beforehand of the nature of the acts condemned, therefore failing to meet the test required by the Fourteenth Amendment to the Constitution of the United States. The warrant under which petitioners are charged is void and unconstitutional for the same reason and should be voided for the same reason.

IX

The students who were picketing as set forth above were arrested on the same day as petitioners and were convicted by the Magistrate's Court of Dorchester County, South Carolina for violation of Section 16-551, Code of Laws of South Carolina, 1962. These cases are now pending appeal to the General Sessions Court of Dorchester County, South Carolina.

X

The petitioners have since their arrival in St. George worked closely with the citizens of Dorchester County in registration, voter education, and securing equal rights for all citizens. The State Court where the charges are pending against petitioners, sits in a community which is hostile to and oppose persons, like petitioners, who actively urge other to exercise their constitutional rights, by working in a lawful and peaceful manner to achieve the equal rights of Negroes and of all persons within the State of South Carolina

XI

That petitioners believe that their arrests and prosecutions have been and are being carried on with the sole purpose and effect of harassing petitioners and of punishing them for, and deterring them from, the exercise of their constitutionally protected rights of free speech and assembly, to protest the conditions of racial discrimination which the State of South Carolina now maintains by Statute, ordinance, regulation, custom, usage, and practice, and to urge Negroes, the primary victims of this discrimination, to register to vote. The petitioners further believe that this harassment is pursuant to a policy of racial discrimination which is now acquiesced in and followed by the officials of Dorchester County, a subdivision of the State of South Carolina

XII

By reason of the foregoing, petitioners are being prosecuted for acts done under color of authority derived from the federal Constitution and laws providing for equal rights, that is, the United States Constitution, Amendments First, Fourteenth, and 42 U.S.C., Section 1983 (1958), and for refusing to do acts on the ground that they would be inconsistent with the Constitution and laws cited. Also by reason of the allegations of paragraphs one through twelve above, Petitioners have been denied their rights and cannot enforce them in the Courts of the State of South Carolina as required by the Federal Constitution and statutory sections providing for the equal rights of citizens of the United States.

WHEREFORE, Petitioners pray:

1. That petitioners be authorized to proceed in forma pauperis in this Court, as provided by 28 U.S.C., Section 1915.

2. That this petition for removal filed pursuant to 28 U.S.C., Section 1443 be granted.

3. That jurisdiction be retained by this Court under the provisions of 28 U.S.C., Section 1443.

4. That these criminal proceedings be removed from the Court of General Sessions, Dorchester County, State of South Carolina, for trial pursuant to 28 U.S.C., Sections 1443 and 1446.

5. That petitioners be released on their own recognizance pending trial of this case.

6. That the Court grant petitioners such other relief as it may deem just, proper, and reasonable for protection of petitioners rights herein.

Ernest A. Finney, Jr.
Sumter, South Carolina

Ruban L. Gray
Sumter, South Carolina

Matthew J. Perry
Columbia, South Carolina

Carl Rachlin
New York, New York

ATTORNEYS FOR PETITIONERS

December 11, 1965

BY: Ernest A. Finney, Jr.
Ernest A. Finney, Jr.

Sumter, South Carolina

State of South Carolina

VERIFICATION

County of Dorchester

Leonard Davidman and Nathaniel Lee, being duly sworn, desposes and says that they are the petitioners herein, that they have read the within petition and that the same is true of their own knowledge except as to those matters alleged on information and belief, and as to these matters, they believe them to be true.

Leonard Davidman L.S.
Leonard Davidman

Nathaniel Lee L.S.
Nathaniel Lee

Sworn to before me this
17th day of December 1965.

Ruben L. Gray L.S.
Notary Public for South Carolina

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

LEONARD DAVIDMAN AND
NATHANIEL LEE,

Petitioners,

versus Crim. No._____

CARL KNIGHT, SHERIFF OF DORCHESTER COUNTY AND
WILSON WIMBERLY, JAILER FOR DORCHESTER COUNTY

Respondents

PETITION FOR WRIT OF HABEAS CORPUS AND

FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: The Honorable J. Robert Martin, Chief Judge, United States District Court for the District of South Carolina:

Petitioners respectfully aver:

I

That the jurisdiction of this Court is invoked pursuant to Title 28, U.S.C., Section 2241 (c) (3) (1958) and the First and Fourteenth Amendments to the Constitution of the United States.

II

That petitioners hereby incorporate within paragraphs 1-13 of the defendants verified petition for removal, attached hereto.

III

That by reason of petitioners subjection to the restraints of bail status, they are presently in custody in violation of the Constitution and laws of the United States.

IV

That due to poverty, the petitioners are unable to pay the costs and fees of this action or to otherwise give security for this action notwithstanding there being good cause for legal redress.

V

That for the reasons set forth in paragraphs 1-13 incorporated herein, there exist circumstances rendering all state corrective processes ineffective to protect petitioners rights.

WHEREFORE, petitioners pray the Court as follows:

(a) That the writ of habeas corpus immediately issue to respondents and that petitioners be immediately brought before the Court should need therefor be made to appear.

(b) That the respondents be required to appear and answer in writing the allegations of this petition.

(c) That after full and complete hearing this Court relieve petitioners of their unconstitutional restraint.

(d) That petitioners be allowed and permitted to proceed in this Court in forma pauperis.

(e) That the Court grant such other and further relief as the Court should determine just and proper under the circumstances.

FINNEY & GRAY
SUMTER, SOUTH CAROLINA

JENKINS, PERRY & PRIDE
COLUMBIA, SOUTH CAROLINA

CARL RACHLIN
NEW YORK, NEW YORK

ATTORNEYS FOR PETITIONERS

Dec. 11, 1965
Sumter, S. C.

BY: ERNEST A. FINNEY, JR.

VERIFICATION

State of South Carolina

County of Dorchester

Leonard Davidman and Nathaniel Lee, being duly sworn, desposes and says that they are the petitioners herein, that they have read the within petition and that the same is true of their own knowledge except as to those matters alleged on information and belief, and as to these matters, they believe them to be true.

Leonard Davidman L.S.
Leonard Davidman

Nathaniel Lee L.S.
Nathaniel Lee

Sworn before me this
11th day of December 1965.

Ruben L. Gray L.S.
Notary Public for South Carolina

The State of South Carolina,
County of Dorchester

H. H. Walters, Jr., Magistrate

for the said County, and the said State, TO ANY LAWFUL CONSTABLE:

WHEREAS, Complaint upon oath has been made by Carl Knight

that on Ist day of Dec. 1965

in the State aforesaid, on Ist day of December, 1965

Nathaniel Lee and Leonard Davidman, did knowingly, unlawfully, willfully and feloniously contribute to the delinquency of minors attending Williams Memorial School at St. George South Carolina, by enticing minors not to attend school, singing and marching on the school grounds and causing a general disturbance, being in a group of pickets, all in violation in section 16-555.1, code of laws of 1962,

THESE ARE THEREFORE to command you to apprehend the said Defendant, Nathaniel Lee and Leonard Davidman

and bring them before me to be dealt with according to law.

Given under my hand and seal this Iat day of December

one thousand nine hundred sixty-five

H. H. Walters (L. S.)
Magistrate

AFFIDAVIT

The State of South Carolina,
County of Dorchester

PERSONALLY appeared before me H. H. Walters, Jr.,

a Magistrate of said Court and the said State Carl Knight, Sheriff of Dorchester County, said State who being duly sworn, says upon information and belief and personal investigation made, Nathaniel Lee and Leonard Davidman, on December Ist, 1965, on and adjacent to the school grounds of Williams Memorial School situate at St. George, in said County and State, did knowingly, unlawfully, willfully, maliciously and feloniously contribute to the delinquency of minors attending the Williams Memorial School , at St. George, Dorchester County, said State, by enticing the students not to attend school, singing and marching on the said grounds of the school and then in the public highway adjacent to theschool, which could heard by students attending school, and being in a group of pickets, which disturbed the school and students in classes as well as the teachers, all of which was unlawful and malicious and done with intent to create a disturbance, and in violation of Sec. 16.555.1 Code of Laws, 1962,

SWORN TO BEFORE ME THIS THE Carl Knight
Sheriff of Dorchester County.

Ist day of Dec. 1965

H. H. Walters (LS)

Notary Public, S. C.

appoint .....
pecial Constable to execute this warrant.

.....
Magistrate

Carl Knight

A. H. Robinson

W. M. Batson

Robt. E. O'Neal

Wilson Wimberly

Officer Dantzler

Chief of Police Jack Robbins

12/3/65

Defendants rights explained
to them and warrant
read & defendants plea
of guilty taken.
H. H. Walters
Magistrate
12/3/65

and set $.50 Cts
each.
H. H. Walters
Magistrate

The State of South Carolina,

County of Dorchester

THE STATE

against

Nathaniel Lee and Leonard Davidman

ARREST WARRANT

Offense Viol. section 16-555.1, contributing to the delinquency of minors, etc

H. H. Walters, Jr.,
St. George, S. C. Magistrate

Date Dec. 1st, 1965

Officer Sheriff Carl Knight and staff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

FILED
DEC 17 1965
MILLER C. FOSTER, JR., CLERK

Leonard Davidman and Nathaniel Lee, Petitioners, -vs- Carl Knight, Sheriff of Dorchester County, and Wilson Wimberly, Jailer for Dorchester County, Respondents.	Civil Action No. CH-65-28 WRIT OF HABEAS CORPUS AND ORDER FOR BAIL

The above named Petitioners are in custody of the Respondents, the Sheriff and Jailer, respectively, of Dorchester County, pursuant to a warrant which charges that each of them have violated the provisions of Section 16-555.1, Code of Laws of South Carolina for 1962. Petitioners have filed in this Court a Petition for Removal of said criminal case from the Court of General Sessions of Dorchester County, South Carolina, to this Court as is permitted by Title 28, U.S.C., Sections 1443 and 1446. The Petition for Removal is based upon allegations that the South Carolina statute upon which the case is predicated is upon its face and as applied to the facts therein set forth, vague, indefinite and uncertain, in violation of the Fourteenth Amendment to the United States Constitution. A full review of those facts here is not necessary at this time since the merits of the Petition for Removal are not presently before the Court. Suffice it to say that jurisdiction of the cause is vested in this Court when the Petition is filed in accordance with the procedure set forth in Title 28, U.S.C., Section 1446.

It appears that the Petitioners are actually in the custody of the Respondents. Petitioners have also filed a Petition for Writ

of Habeas Corpus. This Court is required under Title 28, U.S.C., Section 1446(f), to issue its Writ of Habeas Corpus.

NOW, THEREFORE,

IT IS ORDERED that the Respondents, Carl Knight, Sheriff of Dorchester County, and Wilson Wimberly, Jailer of Dorchester County, their agents, servants and employees, be, and they are hereby, required to produce the bodies of Petitioners Leonard Davidman and Nathaniel Lee to the United States Marshal or his Deputy.

IT IS FURTHER ORDERED that the Petitioners, Leonard Davidman and Nathaniel Lee, be, and each of them is hereby, admitted to bail in the sum of ONE THOUSAND ($1,000.00) DOLLARS conditioned upon their appearance before this Court on January 6, 1966, at the United States Court House in Charleston, South Carolina, at which time the merits of the Petition for Removal will be considered. The bond shall be approved and executed by any United States Commissioner within the jurisdiction of this Court.

Let copies of this Order be immediately served upon the Respondents by the United States Marshal and that a copy of same be filed in the Office of the Clerk of Court for Dorchester County, South Carolina.

IT IS SO ORDERED.

Charles E. Simons, Jr.
UNITED STATES DISTRICT JUDGE

Greenwood, South Carolina

December 16, 1965

TRUE COPY,
TEST:

Miller C. Foster, Jr., Clerk

By: Helen Breeland
DEPUTY CLERK

ORIGINAL FILED

DEC 23 1965

MILLER C. FOSTER, JR., CLERK

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Civil Action No. CH-65-28

LEONARD DAVIDMAN and NATHANIEL LEE, Petitioners,	]	
-versus-	]	ORDER
THE STATE OF SOUTH CAROLINA, Respondent.	]	

The above named petitioners, because of their poverty as shown by a verified Petition of Writ of Habeas Corpus herein, requests the court for permission to file a petition for Writ of Habeas Corpus without prepayment of costs and for leave to proceed in forma pauperis. Pursuant to 28 U.S.C.A. § 1915, it is

ORDERED that the above named petitioners be permitted to file their petition for Writ of Habeas Corpus without prepayment of costs and be permitted to proceed in forma pauperis.

Charles E. Simons, Jr.
UNITED STATES DISTRICT JUDGE

Charleston, South Carolina,

December 22nd, 1965.

TRUE COPY
Test:
MILLER C. FOSTER, JR. CLERK
By: Deputy Clerk

[1966, Feb. 16]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Civil Action No. CH-65-28

THE STATE,

Plaintiff,

-versus-

LEONARD DAVIDMAN and

NATHANIEL LEE,

Defendants.

ORDER

This matter is before the court on motion of the State of South Carolina to remand the criminal prosecutions of the named defendants to the Court of General Sessions for Dorchester County, South Carolina.

On December 13, 1965, defendants filed a consolidated Petition for Removal, pursuant to 28 U.S.C. 1443 and 1446, and to remove the criminal proceedings commenced against them in the Court of General Sessions of Dorchester County, South Carolina to this court. The Petition was signed by Counsel and verified by each defendant.

Included with the removal Petition was a Petition for Writ of Habeas Corpus and for leave to proceed in forma pauperis. Attached was copy of arrest warrant for both petitioners issued by Mr. A. A. Welling, Magistrate, Dorchester County, charging Petitioners with violation of Section 16-555.1, Code of Laws of South Carolina for 1962,[1] by contributing to delinquency of minors by enticing said minors not to attend school and sitting and marching on and near the school

grounds and being in a group of pickets on and near the Williams Memorial School at St. George, S. C.

The defendants substantially allege in their Petition that they are being criminally prosecuted in the South Carolina State Courts because they are "civil rights workers"[2]

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1. "S 16-555.1. Contributing to delinquency of a minor.---It shall be unlawful for any person over twenty-one years of age to knowlingly and wilfully encourage, aid or cause or to do any act which shall cause or influence a minor;

"(1) To violate any law or any municipal ordinance;
"(2) To become and be incorrigible or ungovernable or habitually disobedient and beyond the control of his or her parent, guardian, custodian or other lawful authority;
"(3) To become and be habitually truant;
"(4) To without just cause and without the consent of his or her parent, guardian or other custodian, repeatedly desert his or her home or place of abode;
"(5) To engage in any occupation which is in violation of law;
"(6) To associate with immoral or vicious persons;
"(7) To frequent any place the existence of which is in violation of law;
"(8) To habitually use obscene or profane language;
"(9) To beg or solicit alms in any public places under any pretense;
"(10) To so deport himself or herself as to wilfully injure or endanger his or her morals or health or the morals or health of others.

"Any person violating the provisions of this section shall upon conviction be fined not more than three thousand dollars or imprisoned for not more than three years, or both, in the discretion of the court.

"This section is intended to be cumulative and shall not be construed so as to defeat prosecutions under any other law which is applicable to unlawful acts embraced herein."

2 Defendant Davidman is a white "civil rights worker" from Brooklyn, N. Y.; defendant Lee is a Negro.

in Dorchester County participating in programs to encourage Negroes to register to vote, and participating in picketing activities to end all vestiges of racial segregation in the county. Petitioners allege that such state action is violative of rights guaranteed under the First and Fourteenth amendments to the United States Constitution and of the statutory laws of the United States providing for equal rights of all citizens.

They seek to vest this court with jurisdiction pursuant to the provisions of 28 U.S.C. 1443(1) and (2).

At the time the Petition for removal was filed with the court, a hearing was held with counsel for Petitioners and an assistant Attorney General for the State of South Carolina being present. At this time the court was advised that petitioners were being held in the county jail or Dorchester County pending posting of a $5,000 bond. The court issued its writ of habeas corpus pursuant to 28 U.S.C. 1446(f) to respondents to deliver petitioners into federal custody to appear at the hearing on the motion to remand.[3] At this time the Assistant Attorney General made oral motion to remand the proceedings back to the state court and date was set to hear the motion in Charleston, S. C. on December 22, 1965. It was thereafter changed to January 6, 1966.

Attorneys for the State of South Carolina subsequently filed an Answer to the Petition for removal dated January 5, 1966, asserting that Petitioners can enforce any rights

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[3]Bond was reduced to $1,000 to guarantee appearance of defendants in Federal Court and was subsequently posted for each defendant.

and receive equal treatment in the state court and that the motion to remove is premature in that no indictments have ever been returned with a true bill from the grand jury.

After having heard oral argument from counsel for the parties, studied the brief in support of the motion submitted by counsel for petitioners, and reviewed the early decisions of the United States Supreme Court and later pronouncements of inferior courts concerning the jurisdiction of the federal court on removal petitions, it is my opinion that this court is without jurisdiction and the cases must be remanded to the Court of General Sessions for Dorchester County, South Carolina.

Although Petitioners strenuously urge that this court should assume jurisdiction and retain the case under the provisions of 28 U.S.C. 1443 (2)[4], it is well settled that under the averments contained in the petition for removal this arguments is without foundation. It has been held unequivocally that 1443(2) applies only "to federal officers and those assisting them or otherwise acting in an official or quasi-official capacity". Pennsylvania v. William Anderson, et al., 347 F.2d 823. (3rd Cir. 1965); Peacock v. City of Greenwood, 347 F.2d 679 (5th Cir. 1965). In People of State of New York v. Galamison, 342 F.2d 255 (2nd Cir. 1965),

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[4] 28 U.S.C. 1443(2) provides: "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:.....(2) For any act under color or authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

cert. den. 85 S.Ct. 1342, the court considered the question and although it expressly refrained from deciding whether S 1443(2) is so limited, it stated that even if a private person could invoke the provisions of S 1443(2) such person "must point to some law that directs or encourages him to act in a certain manner, not merely to generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him."

In Galamison, supra, the court concluded that private persons engaged in "equal rights" demonstrations such as these defendants at the time of the alleged violation are not acting under "color of authority" so as to entitle them to the removal rights under S 1443(2). As stated by the court at 342 F.2d at 265:

> "Although alleged denial of equal protection in schools and other respects afforded the motivation and was the subject of appellants' acts, neither the equal protection clause nor S 1981 confers 'color of authority' to perform acts which a state alleges to be in violation of laws of general application intended to preserve the peace from disturbance by anyone. The constitutional provision and the statute are addressed to preventing inequality in the treatment of conduct, and to that great purpose alone. They give no constitutional defense, let alone 'authority', for disregard of laws providing for the equal punishment of disturbers of the peace simply because the disturbances were in the course of protests over alleged denial of equality in schools, housing or economic opportunity any more than the Second Amendment bestows 'authority' to disturb the peace in the course of a protest over an alleged denial of the right to keep arms or the Fourth Amendment does so with respect to a protest over police methods."

Counsel for petitioners admit that jurisdiction of this court cannot be invoked pursuant to S 1443 (1)[5] unless petitioners have been denied, or cannot enforce in the state court, their equal rights guaranteed by federal law. In Kentucky v. Powers, 201 U.S. 1 (1906) the United States Supreme Court clearly pronounced that only deprivations of civil rights resulting from discriminatory state legislation provides cause for removal under S 1443(1), and that unlawful or discriminatory application of state laws by state and local officials does not provide sufficient cause for removal. Kentucky v. Powers has never been overruled and has been closely adhered to by the federal courts until the recent decisions rendered by the Fifth Circuit Court of Appeals during 1965 beginning with Rachel v. State of Georgia, 342 F. 2d 336 and Peacock v. City of Greenwood, 347 F. 2d 679. In these decisions the Fifth Circuit simply refused to follow the decisions of the United States Supreme Court construing the civil rights removal statutes from Strauder v. West Virginia, 100 U. S. 303 (1879) to Kentucky v. Powers, supra, insofar as S 1443(1) is concerned and declares that the removal statutes may be used to vest jurisdiction in the federal courts where non-discriminatory state statutes are used to deprive individuals of their civil rights.

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[5] 28 U. S. C. 1443(1) provides: "Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending: (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof."

The Court of Appeals, Second Circuit,[6] and the Court of Appeals, Third Circuit,[7] have continued to follow the dictates of the Supreme Court culminating in Kentucky v. Powers, supra. The Fourth Circuit Court of Appeals is presently considering the question in Baines v. City of Danville, No. 9080 and McGhee v. City of Danville, No. 9082. Suffice it to say that this court will continue to follow the dictates of the United States Supreme Court in Kentucky v. Powers, until a decision to the contrary is rendered by the Fourth Circuit Court of Appeals.

In accordance with the foregoing this court ruled at the time of hearing the motion to remand that petitioners had the burden to prove that (1) they were being denied their equal civil rights, within the meaning of the removal statutes, by discriminatory state legislation, or (2) they could not enforce their federally protected civil rights in the state courts.

Petitioners concede that the statute under which they are being prosecuted is not discriminatory on its face, and does not discriminate on the basis of race or color. They attempted to prove that they could not get a fair trial and protect their civil rights in the Court of General Sessions for Dorchester County because the community is hostile towards them as civil rights workers. It is certainly undisputed that petitioners have engaged in activitiles un

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[6] People of State of New York v. Galamison, 342 F. 2d 255 (1965).

[7] City of Chester v. Wm. Anderson, et. al., & Commonwealth of Pennsylvania v. Wm. Anderson, et al., 347 F. 2d 823 (1965).

popular to a large setment of the population of Dorchester County, and from the attitude and demeanor of Mr. Davidman who testified at the hearing it is understandable that many good citizens of Dorchester County, or elsewhere, would find him personally obnoxious regardless of the causes he might embrace. Nevertheless, petitioners have failed to convince this court that they cannot enforce any of their civil rights in the state court and have a fair trial, or that they have been refused or cannot invoke all pretrial procedures in the state court such as change of venue motions, reduction of bond, etc., which they have not sought to pursue. Furthermore, if defendants are tried in the Court of General Sessions for Dorchester County, a state Circuit Judge will preside at the trial and this court personally knowing all of the State Judges to be dedicated, unbiased jurists of the highest calibre has no hesitancy in stating that defendants will receive a fair and impartial trial in their court regardless of a hostile community and all and any of their civil rights will be fully protected.

At the hearing counsel for petitioners attempted to argue the unconstitutionality of the state statute under which they are charged on various grounds such as vagueness, ambiguity, etc. The court declined to consider such allegations in connection with the motion to remand in that the constitutionality of the statute involved may be raised as a defense at the time of the trial of the case but it not an issue before this court on a motion to remand. The removal

statute is concerned only with the violation of equal rights contemplated by the civil rights statutes as interpreted by the courts and it not concerned with statutory deficiencies, except as such statutes may discriminate on the basis of race or color, or with alleged violations of due process, freedom of speech, etc., which may be guarded by constitutional provisions or various federal laws, but which are not encompassed within the meaning of civil rights as used in the removal statute. People of State of New York v. Galamison, supra; Peacock v. City of Greenwood, supra.

Furthermore, petitioners can only be tried on an indictment returned by a grand jury for the Court of General Sessions for Dorchester County, not on a local arrest warrant. The charges pending against petitioners have never been presented a grand jury, consequently the petition for removal is premature because the pending criminal prosecution has not been "commenced in a State Court" within the meaning of the removal statute. Virginia v. Paul, 148 U.S. 107 (1892). In Virginia v. Paul, the Supreme Court considered the question of when a criminal prosecution is deemed to be commenced within the meaning of the civil rights statutes passed by the Reconstruction Congress. The Court said at page 121.

> "The true rule on this subject, as it appears to us, was forcibly and accurately expressed by Mr. Justice Grier, in a case removed from the court of quarter sessions of Bucks County in the State of Pennsylvania, before indictment found, into the Circuit Court of the United States for the Eastern District of Pennsylvania, under the act of Congress of March 3, 1963, c. 81, S 5, (12Stat.756) since incorporated in section 641[8] of the Revised Statutes, and which,

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[8]Section 641 of the Revised Statutes has evolved into present Sec. 1443 of Title 28 U.S.C.A.

though differing from the statute now in question in requiring the petition for removal to be originally filed in the state court, yet, in substantial accord with this statute, provides that, 'if any suit or prosecution, civil or criminal, has been or shall be commenced in any state court against any other person,' for any such act as is therein described, done by virtue or under color of authority of the United States, the defendant may file a petition 'for the removal of the cause for trial at the next Circuit Court of the United States to be holden in the district where the suit is pending.' Mr. Justice Grier, after quoting these words, ordered the case to be remanded to the state court, for the following reasons: 'The petition of the defendants brings their case fully within the provisions of this section, but the removal is premature. The prosecution has not been commenced in the state court. A warrant has been issued by a justice of the peace, and the defendants have been arrested preparatory to the commencement of a prosecution in the state court, but the attorney for the Commonwealth has not sent a bill to the grand jury. We do not know, therefore, whether the Commonwealth of Pennsylvania intends to prosecute the defendants for the alleged offence, or whether the grand jury will find a bill, without which the prosecution cannot be said to be "commenced in the state court." The act contemplates the removal of a prosecution "pending" that a "trial may be had in the Circuit Court. If the attorney of the United States were required to send a bill of indictment before a grand jury of the United States court for a breech of the peach of the State, it would present a truly anomalous proceeding. Yet without it there would be no case to try in the Circuit Court. If a bill of indictment had been found in the state court, it would have presented such a case, but, until this is done, there is no case pending in the court of Ducks County, which can be removed to this court for trial. Commonwealth v. Artman, 3 Grant, 436, S. C. 5 Phila. 304.

The court has heretofore issued its writ of habeas corpus to the Sheriff of Dorchester County to surrender custody of the said defendants unto the United States Marshal.

This writ having been issued as ancillary to a removal of the prosecution into the federal court pursuant to 28 U.S.C. 1446(f) and not an ordinary writ of habeas corpus for the discharge of the said defendants requiring a judicial determination by the court, the remanding of the cause to the Court of General Sessions for Dorchester County conveys to the State of South Carolina the right to the custody of the prisoners. Virginia v. Paul, supra.

In accordance with the foregoing it is therefore

ORDERED that prosecution of the State of South Carolina against Leonard Davidman and Nathaniel Lee, be, and it is hereby remanded to the Court of General Sessions for Dorchester County, South Carolina, It is further

ORDERED that the said Leonard Davidman and Nathaniel Lee surrender themselves to the United States Marshal at Charleston, South Carolina on or before 12:00 o'clock noon Monday, February 21st, 1966; the Marshall shall then deliver the defendants forthwith to the Sheriff of Dorchester County.

Let a copy of this order be served upon the defendants and Pink Brown, Rock Hill, South Carolina, surety on the appearance bond for said defendants.

Charles E. Simons, Jr.

UNITED STATES DISTRICT JUDGE

Aiken, South Carolina,

February 11th, 1966.

FEB 50 1966

Friday, October 1,1965
Henry M. di Suvero
c/o W.C. Tracy
107 Franklin St.
St. George, S.C.

John Doar, Esq.
U.S. Dept. of Justice
Civil Rights Division
Washington, D.C. 20530

Re: St. George, Dorchester County
South Carolina

Dear Mr. Doar:

Thank you for having given so freely of your time last Tuesday. The delegation of Negro residents from Dorchester County, the several CORE workers, Mr. Rachlin and myself were all impressed by the generous consideration that you gave to the problems that we posed.

Our group left the meeting feeling that we had at last spoken to someone in Justice who would act expeditiously on problems which had previously been called to the Department's attention, but which had not yet been acted on.

As you may recall, the basic frame of reference of our discussion was my letter to David Norman of Sept. 21,1965. We first requested the appointment of Federal Voting Examiners. Mr. Rachlin turned over some forty odd statements of persons who had unsuccessfully sought to register on Sept. 14,1965, together with several photographs of the registration line taken on that date by Mr. Benjamin Wamen of St. George. You confirmed that the issue of the appointment of Examiners was, as Mr. Terel Glenn had told us previously, under active consideration, and indicated that further investigation would have to be conducted by the Department before it would be appropriate for the Attorney General to decide on the issue. You also indicated that Justice would make further efforts to induce local officials to keep the books open, and that

the performance of these officials on Monday, Oct. 4,1965 would be an important factor in the Department's decision making process. We stated that we felt the only satisfactory solution would be if the books were kept open continuously until all those who desired to register were registered. You told us that we could expect further word on this point on Tuesday, Oct. 5,1965.

Then we discussed the school situation in Dorchester County. We requested the Department to bring suit to desegregate the system and to bring a criminal prosecution against the school officials under 28 U.S.C. 241-2.

Finally we requested criminal prosecution of State Senator H. H. Jessen and the Registrar of Dorchester County, W.O. Owens, Jr. under Sec. 11(b) of the Voting Rights Act of 1965.

You stated that before you could give us any word on what the Department intended to do, you would first have to look at the information which was presently in the Department's hands, and asked us to check with you on Friday, and that at that time you would give us a preliminary report.

Today, on Friday, we spoke at 4:45 p.m. You said that you had not yet received a full report on the St. George situation; that the Department will closely observe the registration processes on Monday; that the bringing of a school desegregation suit was just being delved into and that your subordinates were not ready to discuss it; and that no word could be given on the bringinf of criminal prosecutions since these matters needed comprehensive and thorough examination.

To say the least, I am very disappointed by the extent of your consideration and action on the problems we discussed on Tuesday.

I did not expect any word today on the appointment of Federal Examiners because of the factors you had told us about previously. However I did expect something more on the bringing of a desegregation suit, and on the 11(b) and

241-2 prosecutions. Frankly, I don't see grave problems in the 11(b) prosecutions; my understanding is that the first step, the initiation of an investigation, is a fairly easy one to take. I might point out that both of the 11(b) prosecutions we seek do not involve more than fifeteen witnesses, including the potential defendants. I appreciate that the 241-2 prosecutions would be much more difficult to bring, but as I said at our meeting, although statements have been taken from Negro parents and children, to our knowledge no investigation of the school officials themselves has yet been initiated. Again, I do not see why there must be a great amount of deliberation before an investigation of these officials is begun. I understand it is not our role to prosecute, but we feel we are entitled to have the Department commit itself to conduct an investigation and to determine if serious violations of law have indeed occurred, when allegations of such violations have been presented to it.

As you suggested today, I shall have forwarded to your office a report of Monday's registration, and I shall call you again at the beginning of the week for a further report on all matters.

It was a pleasure having met you after having heard so many fine things about you, and again, on behalf of our delegation, let me thank you for the time that you gave us.

King regards,

Sincerely,

CC: Carl Rachlin, Esq.
CORE
38 Park Row
N.Y.,N.Y. 38

CC: Henry Schwarzchild
Lawyers Constitutional Defense Committee
156 Fifth Ave.
N.Y.,N.Y. 10010

MEMORANDUM

November 30, 1965

TO: Carl Rachlin, General Counsel
FROM: George Wiley, Associate National Director
RE: South Carolina Legal Situation

On my trip to South Carolina I talked at some length with Frank Robinson about some problems regarding school integration in Dorchester County. Desuvero was down here just before me and had talked with Frank Robinson and with Attorney Finney about some possible school desegregation suit. Frank told me some very grim bear stories about Finney, which suggest to me that we should not get involved with him at all, and indeed there are problems about other local lawyers, as you know, here in South Carolina that will be willing to work with us. The very serious problem about legal help makes it seem to me that it would be very important if we can get some kind of full time lawyer down there - it would be very helpful. I would also like to know exactly what Desuvero's relation to CORE is; how much time he will be spending in South Carolina and whether or not we are bearing the expense for that.

There continues to be a serious problem in Dorchester County, in that the kids that have been going to integrated schools are still being beaten up very regularly by the white kids and the school officials refuse to do anything about it. I contend that that is a discriminatory practice when they can't get protection from the school authorities, and I should think we should be able to get federal action on that. Is that not actionable item under Title VI and can we not get the Justice Department to move on it? I understand that Desuvero has the affidavits on this from before, and more information can be gotten.

They're also considering sending another delegation up to Washington to make additional complaints on this harassment situation. I suggested that perhaps this could be coupled with direct action, such as a sit-in in the Office of Education, to call attention to the fact that O.E. and the Justice Department won't act on these complaints. The other aspect of the complaint is that the people who have applied for transfer to the white schools, whose applications have not been accepted, have had no action taken on their applications. They also want to send such people up to Washington. They are further considering a one or two day school boycott to add more public weight to this protest for school desegregation. This would seem to me to be an important thing for us to push in terms of suits and other help in order to dramatize the general drive for enforcement of Title VI, and I would suggest that we investigate these possibilities.

M E M O R A N D U M

TO: GEORGE WILEY

FROM: Carl Rachlin December 7, 1965

SUBJECT: SOUTH CAROLINA LEGAL SITUATION

I have your memorandum dated November 30, but I assume it relates, in fact, to the conversation we had several days ago on the South Carolina legal situation. The only comments that I would care to make at this time are:

1) It does not appear to me to be wise to make an absolute decision regarding the use of South Carolina lawyers. There are situations in which we can use them and where they have served with success in the past. There are any number of situations in which Finney has done good work. It is absolutely truer however, that we have had no luck in using him in cases where we are trying to obtain affirmative relief. But in many arrest situations, there is notreason why we cannot use him or Earl Coblyn of Orangeburg. I have watched Coblyn work and he seems to be reasonably competent, nor does he seem to be particularly timid.

Of course, both of these people are South Carolina lawyers, and all South Carolina lawyers have close ties with the NAACP and this may cause hang-ups at times, but these lawyers still have their uses and Finney has handled some cases quite well. Coblyn, it should be noted is a northerner who has settled in Orangeburg. My recollection is that he comes from Cambridge, Massachusetts and still has some New England in his accent.

I would be perfectly happy to have a full time lawyer in South Carolina in the foreseeable future but this is primarily a question of money. On principle, I am in favor of it. There is no doubt that we can do far more. There is no doubt that we need somebody there who is not afraid to go for an injunction against all the local authorities that could be useful.

With regard to DiSuvero he is an employeee of ACLU. He went to South Carolina at my request under the auspices of LCDC. I will have to work out with LCDC how his expenses will be covered. Of course, there are no legal fees involved and his expenses will be relatively little since he stayed at the home of Mrs. Tracey or one of the other local people.

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

December 9, 1965

DEC 14 1965

Attorney Carl Rachlin
Congress of Racial Equality
38 Park Row
New York 38, New York

Dear Carl:

I am writing this letter to clarify what appears to be an administrative dillema. I refer specificly to the position of this office in connection with the Congress of Racial Equality with specific reference to the current situation in Dorchester County.

I wish to say at the outset that I have no desire to be difficult and that I have enjoyed working with CORE for the past five years. We have no desire to in anyway modify whatever its legal arrangements are. We would simply like to know what these arrangements are and where this office fits into the picture if at all.

During the time we have represented CORE we have generally considered legal counsel from CORE throughout the state, and so far as we are able to determine this arrangement was satisfactory with all parties concern. Recently, two very fine young lawyers have come into the state and have handled some of the legal work from Dorchester County. Several other lawyers within the state have been contacted with regard to the Dorchester situation.

This has led to mass confusion regarding what lawyers represent specific clients, what law suits will be filed, and what legal steps should be taken, and who is going to do what. As a result of this situation on yesterday a young man was convicted without benefit of counsel, and there are two CORE volunteers in jail in Dorchester County, where they have been for one week, and no steps have been taken to secure their relief.

I wish to state again that all of the lawyers involved in this situation of excellent caliber and this letter is not intended to reflect any way upon them. However, I feel in order to protect the professional reputation of this office, and to provide the best legal representation for the people of Dorchester County, this situation must be clarified in some manner and as quickly as possible.

December 9, 1965

Very truly yours,

Ernest A. Finney, Jr.

jvl

cc: Mr. Floyd McKisset
Mr. James Farmer
Mr. Marvin Rich
Mr. James T. McCain
Mr. Frank Robinson

LAW OFFICES
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SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

DEC 14 1965

December 9, 1965

Mr. Carl Rachlin
Valdeck & Elias
Attorneys at Law
280 Broadway
New York 7, New York

Dear Mr. Rachlin:

This is to advise that this office represented nineteen young people charge with the offense of disturbing a school attended by girls in the Magistrate's Court of Dorchester County on Monday December 6, 1965. In connection with this matter we would like to submit the following statement. On Wednesday, December 1, approximately forty pupils of the Williams Memorial School began picketing the school. They picketed on the school ground for approximately fifteen minutes on the direction of the sheriff of Dorchester County they stopped picketing on the school grounds and entered the public street in front of the school and resumed their picketing they stayed in the streets for approximately two hours and of their own accord stopped picketing. On the next day seventeen of these people were arrested on the charge mentioned above. Their arrest were based upon warrant signed by the Superintendent of Dorchester County School District No. 2 having received the individuals name from the principal of the school. As a result of the trial sixteen of these people were found guilty as charged and were sentence to pay a fine of $100.00 or serve thirty days.

During the course of the trial we made the usual motions to protect the rights of these pupils under the Constitution of the United States and of South Carolina. Also, we raised the question of legislative intent under the statute of which they were charged. The charge had been inacted in 1919, and being apparent designed to prevent boys from loitering around an all girl school.

The following is a statement of expenses:

1. Two days for conference with clients and preparation for trial $150.00.

2. One day preparation of Notice of Intention to Appeal and Exception $100.00.

3. Travel three trips to St. George 372 miles .10 per mile $37.20.

4. Estimate cost of record $32.50

5. One day for trial $100.00

Total------$419.70

You will be reciveing a copy of the Notice of Intention to Appeal and exceptions within 4 days. You will note that there were 2 [redacted] lawyers involed in this matter. We would appreciate very much any thing you can do to expedite the handling of this matter.

Very truly yours,

Ernest A. Finney, Jr.

cc: Marvin Rich

OFFICE OF THE CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON 29402

December 17, 1965

Mr. Ernest A. Finney, Jr.
Sumter, South Carolina

Mr. Ruben L. Gray
Sumter, South Carolina

Mr. Matthew J. Perry
1107½ Washington Street
Columbia, South Carolina

Mr. Carl Rachlin
c/o Mr. Ernest A. Finney, Jr.
Sumter, South Carolina

Mr. Julian S. Wolfe
Solicitor
Orangeburg, South Carolina

Hon. Daniel R. McLeod
Attorney General of the
State of South Carolina
Columbia, South Carolina

Re: CR. CH-65-20 - Leonard Davidman, et al. vs. The State of South Carolina

Dear Sirs:

Judge Simons has directed me to advise you that he will hear the Petition for Removal in the above matter at the United States Courthouse in Charleston, South Carolina, on Thursday, January 6, 1966, at 10 a. m.

All interested parties should be present at the above stated time.

Sincerely yours,

MILLER C. FOSTER, JR., Clerk

By: Helen Braland
Deputy Clerk

B:B

cc: Honorable Charles E. Simons, Jr.
Mrs. Doris C. Appleby, Official Court Reporter
Mr. John A. Rowland, United States Marshal

OFFICE OF THE CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON 29402

December 17, 1965

Mr. Ernest A. Finney, Jr.
Sumter, South Carolina

Mr. Ruben L. Gray
Sumter, South Carolina

Mr. Matthew J. Perry
1107½ Washington Street
Columbia, South Carolina

Mr. Carl Rachlin
c/o Mr. Ernest A. Finney, Jr.
Sumter, South Carolina

Mr. Julian S. Wolfe,
Solicitor
Orangeburg, South Carolina

Mr. Daniel R. McLeod
Attorney General of the
State of South Carolina

Re: C/A CH-65-28 - Leonard Davidman, et al. vs. Carl Knight, Sheriff of Dorchester County, et al.

Dear Sirs:

I am enclosing to each of you a certified copy of Writ of Habeas Corpus and Order for Bail in the above matter, which has been filed today.

Sincerely yours,

MILLER C. FOSTER, JR., Clerk

By: Helen Breeland
Deputy Clerk.

Emb

Enclosures

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

December 17, 1965

Mr. Carl Rachlin
Valdeck & Elias
Attorneys at Law
280 Broadway
New York 7, New York

Re: David & Lee

Dear Carl:

I am enclosing herein copies of the South Carolina Statute Section 16-555.1 and Section 16-551, Code of Laws of South Carolina, 1962. Davidman and Lee are charged under Section 16-555.1 under a warrant which alleges that they encouraged some students to disobey Section 16-551. This matter is scheduled for hearing on Thursday, January 16, 1966, we are particularly concern about the constitutionality of Section 16-555.1 on its face. If you have some law students who want to do some research or any cases in mind we would appreciate any memorandum that they may send us before January 2, 1966.

Yours very truly,

Ernest A. Finney, Jr.

JVL

Enclosures

OFFICE OF THE CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF SOUTH CAROLINA

CHARLESTON 29402

December 23, 1965

Messrs. Finney & Gray
Attorneys at Law
Sumter, South Carolina

Messrs. Jenkins, Perry & Pride
1107½ Washington Street
Columbia, South Carolina

Mr. Carl Rachlin
c/o Mr. E. A. Finney
Sumter, South Carolina

Mr. Julian S. Wolfe
Solicitor
Orangeburg, South Carolina

Mr. Daniel R. McLeod
Attorney General for the
State of South Carolina
Columbia, South Carolina

Re: C/A-65-28, Davidman, et al. v. Carl Knight,
Sheriff of Dorchester County, et al.

Dear Sirs:

I am enclosing to each of you a certified copy of Order, signed by Judge Simons and filed today in the above entitled cause.

Sincerely yours,

MILLER C. FOSTER, JR., Clerk

By: Deputy Clerk

nhl/

Enclosure

So. C. P. Records Com.

December 29, 1965

Ernest Finney, Esq.
16½ West Liberty Street
Sumter, South Carolina 29151

Dear Ernest:

I hope this will be of help to you with regard to analyzing Sec. 16-555 and Sec. 16-551. If you need more help, please whistle.

Best wishes for the New Year.

Sincerely,

CARL RACHLIN
General Counsel

CR/cs

PHONES
OFFICE 775-1737
HOME 773-9738

P. O. BOX ~~802~~ 836

LAW OFFICES
ERNEST A. FINNEY, JR.
16 1-2 W. LIBERTY STREET
SUMTER, S. C.

JAN 19 1965

January 15, 1966

The Honorable Charles E. Simons, Jr.
U. S. District Judge
District Court of South Carolina
Charleston Division
U. S. Courthouse
Charleston, South Carolina

Re: C/A65-28, Davidman, et al. v. Carl Knight, Sheriff of Dorchester County, et al.

Dear Judge Simons:

I am enclosing herein the original and one copy of the Petitioners Memorandum in the above entitled matter for your consideration. I am at this time mailing to the Attorney General's Office and to Solicitor Wolfe a copy of this Memorandum.

Sincerely yours,

Ernest A. Finney, Jr.

Ernest A. Finney, Jr.

EAF JR:jvl

Enclosures

cc: Mr. Everett Brandon
Mr. Matthew J. Perry
Mr. Carl Rachlin
Mr. Julian Wolfe

February 2, 1966

Ernest Finney, Esq.
16½ West Liberty Street
Sumter, South Carolina

Dear Ernest:

Hopefully by this time you should have received the various papers from Hank DiSuvero. Hank tells me he is working on an injunction case which has particular aspects of interest to him and the Civil Liberties Union. Please keep me advised as to how things are moving.

As you might expect, your papers in Davidman & Lee were excellent. I am very proud to be associated with you and I hope that by our joint efforts we can help the people in South Carolina in the areas where CORE is active. By the way, do not hesitate to recommend to me any litigation you think is advisable.

I look forward to seeing you soon. With best regards,

Sincerely,

CARL RACHLIN
General Counsel

CR/cs

cc: Jim McCain
Henry DiSuvero, Esq.
Marvin Rich

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

February 16, 1966

803

FEB 21 1966

Mr. Carl Rachlin
Valdeck & Elias
Attorneys at Law
280 Broadway
New York, New York

Re: C/A No. CH-65-28,
The State v. Davidman, et al.

Dear Carl:

Enclosed you will find a copy of Order of Honorable Charles E. Simons, Jr., filed February 12, 1966 in the above entitled cause.

Yours very truly,

Ernest A. Finney, Jr.

Ernest A. Finney, Jr.

EAF JR:jvl

Enc.

UNIVERSITY of PENNSYLVANIA
PHILADELPHIA 19104

The Law School

February 24, 1966

Carl Rachlin, Esq.
General Counsel
Congress of Racial Equality
38 Park Row
New York, New York 10038

Re: South Carolina v. Davidman and Lee,
U.S.D.C., South Carolina,
Charleston Division, C.A. No. CH-65-28

Dear Carl:

Thanks for sending up the Davidman opinion and order. As I see it, you stand as follows:

(A) On the merits:

(1) As Judge Simons recognizes, his ruling is inconsistent with recent Fifth Circuit decisions construing § 1443(1). It is plain that the removal petition in this case was sufficient to withstand remand under the Fifth Circuit's opinions in, e.g., Peacock v. City of Greenwood, 347 F.2d 679 (5th Cir. 1965), cert. granted, January 17, 1966; Rogers v. City of Tuscaloosa, 353 F.2d 78 (5th Cir. 1965); Cooper v. Alabama, 353 F.2d 729 (5th Cir. 1965); Brown v. City of Meridian, 5th Cir. No. 21730, decided January 26, 1966; Calhoun v. City of Meridian, 5th Cir. No. 21991, decided January 26, 1966.

However, the Fourth Circuit has just come down with its leading removal decisions, which are inconsistent with the Fifth Circuit view. Baines v. City of Danville, 4th Cir., No. 9080, decided January 21, 1966; Virginia v. Wallace, 4th Cir. No. 9462, decided January 21, 1966; Virginia v. Morris, 4th Cir. No. 9587, decided January 21, 1966. Under these cases, the Davidman petition is insufficient because it does not show [redacted] a facially unconstitutional state statute (or some other circumstance apparent without trial of issues of fact) violating the defendants' rights under the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court has granted cert in Peacock (Nos. 471, 649) and will hear it in April, following Georgia v. Rachel (No. 147). Presumably the Court will in Peacock decide all the issues which control Davidman on the merits and which presently divide the Fourth and Fifth Circuits. Applications for cert have been filed by Bill Kunstler and Arthur Kinoy in Baines and by the Inc. Fund in Wallace and Morris; the Fourth Circuit has granted stays of mandate pending cert in all three cases; the Supreme Court may but probably won't hear them with Peacock. More likely, it will sit on the cert petitions

until Peacock has been decided, then dispose of them in its light.

In this posture, I would suppose you could easily enough get Simons to stay his remand order pending appeal, note your appeal, move the Fourth Circuit to postpone argument until decision in Peacock, Baines, etc. (which motion might not be necessary, if the Fourth Circuit's calendar is what it usually is), and profitably sit and wait. If Simons refused a stay, I have little doubt that the Fourth Circuit would grant one after noting of the appeal.

(2) Simons' ruling is supported by all the Circuits to date insofar as he holds the removal petition insufficient under § 1443(2). However, the subsection (2) issue is now before the Supreme Court in Rachel and Peacock, Baines, Wallace and the Third Circuit case cited by Simons (Anderson v. City of Chester (No. 443) (petition for cert pending)). Hopefully, the Court will disagree with the Circuits -- unless, by taking the Fifth Circuit view of subsection 1443(1), it renders the subsection (2) question academic. I would guess the chances are 75%-25% the Supreme Court in one of the pending cases will adopt a theory either of subsection (1) or subsection (2) which allows removal in Davidman. In any event, for present purposes, subsection (2) adds no practical wrinkles or problems to what I said in the previous paragraph on the subject of subsection (1).

(B) Prematurity:

(1) Your biggest problem in Davidman is the prematurity issue. If Simons is right (and I suppose he is) that the contributing charge is prosecutable in the South Carolina courts only by indictment, Virginia v. Paul does, as he says, hold pre-indictment removal premature. No cases are presently pending in the Supreme Court or the Circuits (to my knowledge) asking reconsideration of Virginia v. Paul.

(2) Under the substantive theory of removal adopted by the Fifth Circuit in Rachel and Peacock (that arrest and pretrial repressive process constitute the "denial" of civil rights of which § 1443(1) speaks), I suppose the argument is tenable that Virginia v. Paul should not be applied in civil rights (§ 1443) removal cases, because this sort of "denial" can be and is worked by pre-indictment state process. The argument has intellectual appeal, but I doubt that the courts will buy it. There is simply not that much need for pre-indictment removal (given the availability of federal habeas corpus if charge is delayed), and Virginia v. Paul states a relatively mechanical, rule-of-thumb procedural standard which I doubt will be much affected by views on the merits of removability.

(3) The question, then, is where this leaves you. But for the prematurity point, you would pretty clearly be entitled to a stay of remand pending appeal, and a consequent turn in the waiting list until decision of Peacock. With the prematurity issue rather cold-turkey against you (I really think the argument in paragraph B(2) supra doomed, and would not myself take that issue up on appeal), you are probably not entitled to the stay. But

of course insofar as Simons' opinion remanding the prosecutions is based only on Virginia v. Paul, it would not preclude your filing a second removal petition immediately after indictments are returned, and thus forcing Simons back to the single ground which is now before the Supreme Court.

(4) As a practical matter, if I were you, I would go in to Simons, point out that his Virginia v. Paul ground, even if well taken, is not dispositive against a subsequent re-removal, while the Kentucky v. Powers ground, controlling the ultimate jurisdictional question of removability, is now at issue in the Supreme Court. In this posture, I would suggest that it would be appropriate for him to grant a motion for reconsideration, vacate his orders of February 11, and hold the case subject to reargument after decision in Peacock. If Peacock goes in your favor, it would then be in order to ask whether South Carolina wishes to stand on the Virginia v. Paul ground alone, in light of the fact that remand on that ground accomplishes nothing but some delay and added paper work before you are back in federal court.

Of course, if Simons refuses this sort of reasonable suggestion, I would pursue the appeal, obtain a remand in light of Peacock after Peacock is decided in your favor, and then put South Carolina the same quibbling choice.

Be well.

As ever,

Tony

Anthony G. Amsterdam

AA:mh

February 25, 1966

Prof. Anthony Amsterdam
University of Pennsylvania
Law School
Philadelphia, Pennsylvania 19104

Dear Tony:

Thanks everyso much for your letter with regard to Davidman & Lee. Within moments after I received your letter, Ernest Finney of South Carolina, who is our attorney there, called to say that the District Attorney involved would agree not to attempt to raise the bail any further, after we had it reduced in the federal court. As a result, Ernest recommended to me that we play the thing through the State courts. He has had phenomenal success in the state courts. In view of the cautions in your letter and the fact that, unhappily we do not have the money for taking every case to the United States Supreme Court we decided to follow it up in the state court. Your memo will be terribly useful for all of us and I expect to reproduce it and send it to a number of lawyers in the field for their information.

By the way, I spoke to some of the Deputy Clerks in the United States Supreme Court about what is now being called "The Case of the Bouncing Mandate" (Callendar v. Florida) and they told me to sit tight until the Supreme Court decided what it wants to do with the Supreme Court of Florida. I am still sorely tempted to move to reargue Dresner on the grounds that the United States Supreme Court improvidently decided that they had improvidently granted Certiorari. As you may recall, during the middle of the argument the Supreme Court decided it would certify a question to the Florida Supreme Court as to the nature of the appeal Toby Simon would have had if he had taken Dresner to the Florida Supreme Court. As might be expected,

Cont'd...

the Florida Supreme Court said they would have given them all kinds of appeals, you just name it and he could have had it. In Callendar, of course, they are taking the position that we improperly took the case to them, that they did not deserve to have it and therefore (behind their smirks) are presumably saying that the United States Supreme Court improperly heard the case, if you can believe such a thing. Since at the time the Petition for Certiorari was filed with the United States Supreme Court, the Florida Supreme Court had used up all the appellate time we had after the decision from the intermediate Florida court.

In any event, all this makes life interesting and I look forward to seeing you soon. With best personal regards,

Sincerely,

CARL RACHLIN
General Counsel

CR/cs

cc: Ernest Finney, Esq.

[Enclosed, Finney to Rachlin, 1966, April 21]

COPY COPY COPY COPY COPY COPY COPY

WILLIAM L. RHODES, JR.
Judge, Fourteenth Judicial Circuit
HAMPTON, SOUTH CAROLINA

April 8, 1966

C. T. Goolsby, Jr., Esq.
Assistant Attorney General
Office of the Attorney General
Columbia, South Carolina

Re: State vs. Nathaniel Lee and
Leonard Davidman (Dorchester County)

Dear Mr. Goolsby:

The record will reflect that at the Term of General Sessions for Dorchester County held during the current week I ruled in open Court, on motion of the defendants, that the indictment in the above captioned case contained insufficient allegations to adequately apprise the defendants of the charges against them and said motion to quash was granted. It was requested by the State that I issue a formal written order to such effect, which request was granted. However, you have advised me over the telephone this date that your request for a written order is withdrawn and, accordingly, I will not prepare the contemplated written order. The ruling on this motion having been made in open Court is a matter of record and no further action by this Court is required, your request for a written order having been granted as a matter of courtesy. This letter is for the purpose of confirming the status of this matter, and advising all interested counsel that no written order will be filed.

You further advised me this date that the State did not contemplate an appeal from my decision. However, if the State does decide to appeal, the attention of all counsel is called to the fact that the time for such an appeal would date from that the oral order was issued by me in open Court.

I am sending a copy of this letter to Solicitor Wolfe and to Mr. Finney, counsel for the defendants.

With kind regards, I am

Sincerely,

W. L. Rhodes, Jr.

R.n

cc: Solicitor Julian S. Wolfe
Orangeburg, S. C.

Ernest Finney, Esq.
Sumter, S. C.

COPY

COPY COPY COPY COPY

STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
Columbia, S. C. 29202

April 8, 1966

Honorable William L. Rhodes, Jr.
Circuit Judge
Hampton, South Carolina

Re: State v. Nathaniel Lee and Leonard Davidman

Dear Judge Rhodes:

This letter is to confirm our conversation of this date during which I disclosed that the State will not appeal your action in quashing the indictment relating to the above-entitled criminal case. It will not be necessary, therefore, for you to prepare a formal order.

With kindest personal regards,

Sincerely,

C. T. Goolsby, Jr.
Assistant Attorney General

CTG/djd

CC: Honorable Carl Knight
Sheriff, Dorchester County

Honorable Julian S. Wolfe
Solicitor, First Judicial Circuit

Ernest A. Finney, Jr., Esq.
Attorney at Law

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

RECEIVED
APR 11 1966

April 9, 1966

Mr. Carl Rachlin
Attorney at Law
165 W. 46th Street
New York, New York 10036

Re: State v. Nathaniel Lee and Leonard Davidman

Dear Mr. Rachlin:

I am enclosing herein a copy of the letter which I received from C. T. Goolsby, Assistant Attorney General for the State of South Carolina, which indicates that the State will not appeal the Judge's quashing in the above entitled matter. I am very pleased with the outcome of the Trial and I am sure that CORE is satisfy.

The young men involved seem to have been very happy and they indicated at that time they were going to confer with you. As you are probably aware the indictments were quash by the Judge at the Trial. We are taking the liberty of sending a copy of this letter to Mr. R. J. Palmer, who stood bond for the young men.

Thank you very much for your consideration and cooperation.

Yours very truly,

Ernest A. Finney, Jr.

EAF Jr:jvl

Enclosures: Copy letter
Expense Statement

cc: Mr. R. J. Palmer
Mr. Marvin Rich

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

To: CORE, Scholarship, Education and Defense Fund, Inc. April 9, 1966

From: Finney and Gray Attorneys Subject: Expense Statement State v. Nathaniel Lee and Leonard Davidman

1. Preliminary hearing March 7, 1966, St. George, South Carolina $100.00

2. Preparation and Investigation of Jury panel $100.00

3. Preparation of Brief, Motions, and for Trial $200.00

4. Two days in Dorchester County, two lawyers $75.00 per day $300.00

5. Five trips to Dorchester County 140 miles each trip at .10 per mile $70.00.

Total---------- $770.00

Respectfully Submitted,

Ernest A. Finney, Jr.

LAW OFFICES
FINNEY AND GRAY
16½ WEST LIBERTY STREET
SUMTER, S. C. 29151

ERNEST A. FINNEY, JR.
RUBEN L. GRAY

P. O. BOX 836
TELE. 775-1737

APR 14 1966

April 12, 1966

Davidman Lee

Mr. Carl Rachlin
Attorney at Law
165 W. 46th Street
New York, New York 10036

Re: State vs. Nathaniel Lee and
Leonard Davidman (Dorchester County)

Dear Mr. Rachlin:

Enclosed you will find a copy of the letter which we received from Judge William L. Rhodes, Jr. in the above captioned matter.

Thank you very much for your consideration and cooperation.

Yours very truly,

Ernest A. Finney, Jr.

Ernest A. Finney, Jr.

EAF Jr:jvl

Enc.

[enclosed, Finney to Rachlin, 1965, December 17]

16-551. DISTURBING SCHOOL ATTENDED BY GIRLS OR WOMEN.

It shall be unlawful:

(1) For any person wilfully or unnecessarily (a) to interfere with or to disturb in any way or in any place the students or teachers of any school or college in this State attended by women or girls, (b) to loiter about such school or college premises or (c) to act in an obnoxious manner thereon; or

(2) For any person to (a) enter upon any such school or college premises or (b) loiter around the premises, except on business, without the permission of the principal or president in charge.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and, on conviction thereof, shall pay a fine of not less than ten dollars not more than one hundred dollars or be imprisoned in the county jail for not less than ten days nor more than thirty days. (1952 Code 16-551; 1942 Code 1129; 1932 Code 1129; Cr. C. '22 28; 1919 (31) 239.)

16-555.1. CONTRIBUTING TO DELINQUENCY OF A MINOR.

I It shall be unlawful for any person over twenty-one years of age to knowingly and wilfully encourage, aid or cause or to do any act which shall cause or influence a minor:

(1) To violate any law or any municipal ordinance;

(2) To become and be incorrigible or ungovernable or habitually disobedient and beyond the control of his or her parent, guardian, custodian or other lawful authority;

(3) To become and be habitually truant;

(4) To without just cause and without the consent of his or her parent, guardian or other custodian, repeatedly desert his or her home or place of abode;

(5) To engage in any occupation which is in violation of law;

(6) To associate with immoral or vicious persons;

(7) To frequent any place the existence of which is in violation of law;

(8) To habitually use obscene or profane language;

(9) To beg or solicit alms in any public places under any pretense;

(10) To so deport himself or herself as to wilfully injure or endanger his or her morals or health or the morals or health of others.

Any person violating the provisions of this section shall upon conviction be fined not more than three thousand dollars or imprisoned for not more than three years, or both, in the discretion of the court.

This section is intended to be cumulative and shall not be construed so as to defeat prosecutions under any other law which is applicable to unlawful acts embraced herein.
(1957 (50) 572.)

MSS SEDFRE
546

DAVIS, A.L. et al. VS. GALLINGHOUSE, A.P. NEW ORLEANS, LOUISIANA 1965

Box 36
Folder 11

State Historical Society Of Wisconsin

Please Retain Original Order

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

REV. A. L. DAVIS, EARLINE NEALEY
and CALEB HADLEY, and all Negroes
similarly situated.,

CIVIL ACTION NO.

Plaintiffs

COMPLAINT

vs.

A. P. GALLINGHOUSE, Registrar of Voters of the Parish of Orleans, State of Louisiana, HONORABLE JOHN J. McKEITHEN, Governor of Louisiana, and the Board of Registration of the State of Louisiana, comprised of HONORABLE JOHN J. McKEITHEN, Governor of Louisiana, VAIL M. DELONY, Speaker of the Louisiana House of Representatives, and C. C. "TADDY" AYCOCK, Lieutenant Governor of the State of Louisiana,

Defendants.

* *

The plaintiffs complaining of the defendants allege that:

1. This Court has jurisdiction of this action under 28 U.S.C. 1343 and 42 U.S.C. 1983, and the fourteenth and fifteenth amendments to the United States Constitution.

2. This action is brought pursuant to Rule 65, Federal Rules of Civil Procedure to enjoin the defendants and their agents and deputies from engaging in acts, practices and procedures denying to these plaintiffs rights guaranteed to them by the fourteenth and fifteenth Amendments to the United States Constitution, Section 2 of the Voting Rights Bill of 1965 (adopted August 6, 1965), 79 Stat. 437 et seq. Public Law 89-110 and 42 U.S.C. 1971 (a) (1) and (2).

3. Pursuant to Rule 23, Federal Rules of Civil Procedure the plaintiffs are adequate representatives of a class of persons so numerous as to make it impracticable to bring them all before the Court, and there are common questions of law and fact affecting

the several rights of each of the members of the class, and a common relief is sought.

4. The plaintiffs are Negro citizens of the United States and of Louisiana, not less than twenty-one years of age, who possess the qualifications necessary to be eligible to register to vote in Orleans Parish, Louisiana, and in the precincts and wards in which they reside.

5. The defendants are officials of the State of Louisiana charged by the Statutes of Louisiana, including Louisiana Revised Statutes section 18:1 and section 18:6, with the responsibility of registering eligible voters in the Parish of Orleans, State of Louisiana, the defendant A. P. Gallinghouse being the Registrar of Voters of said Orleans Parish, and the defendants John J. Mc McKeithen, being governor of the State of Louisiana, and being by Louisiana Revised Statute 18:1 as such, charged/with appointing the Registrar for the Parish of Orleans, and the defendants, John J. McKeithen, Vail M. Delony and C. C. Aycock, being members of the Board of Registration of the State of Louisiana, and being charged pursuant to Article 8, Section 17 of the Louisiana Constitution with the removal of Registrars.

6. From about the sixth day of August, 1965 to the present the defendants and each of them have utilized and are still utilizing acts, procedures and devices intended to impede and obstruct the registration of Negroes who are eligible to register to vote in Orleans Parish, Louisiana, to-wit:

(a) That pursuant to the instructions of defendant, A. P. Gallinghouse, the Deputy Registrars in the central registration office at the City Hall in the City of New Orleans, Parish of Orleans, State of Louisiana have unlawfully ~~and unreasonably~~ required, and continue to so require, that prospective registrants who are members of plaintiff's class produce documents of identification and residence, even though said persons are willing to swear to the truth of statements of age, residence, and identity given to the deputy registrars, as shown by the affidavits annexed hereto and, by this reference made a part hereof.

(b) That pursuant to said instructions said Deputy Registrars have required and are still requiring prospective registrants who are members of plaintiff's class to produce excessive and unreasonable documentation of identity and residence, and have unreasonably rejected proof of identity and residence tendered by members of the plaintiff's class, have refused to allow said persons to register as shown by the affidavits annexed hereto and by this reference made a part hereof.

(c) That pursuant to said instructions said Deputy Registrars have required members of the plaintiff's class to read portions of the registration application, contrary to the provisions of the Voting Rights Bill of 1965, Sections 4 (a), (b), (c), and following the determination of the Attorney General of the United States published in Fed. Register at Vol. , page 9859, section 203. as shown by the affidavits annexed hereto and by this reference made a part hereof.

(d) That defendant, A. P. Gallinghouse for the purpose of denying to members of the plaintiff's class the right to register and vote has failed to employ sufficient Deputy Registrars to register members of the plaintiff's class, as shown by the affidavits annexed hereto.

(e) That the defendant A. P. Gallinghouse has refused to extend the hours of registration and has adopted methods which have resulted in an unnecessary slow pace of registration for the specific purpose of denying to members of the plaintiff's class the right to register and vote as shown by the affidavits and Exhibit 1 annexed hereto.

(f) Upon information and belief the plaintiffs further allege that pursuant to instructions of defendant, A. P. Gallinghouse , Deputy Registrars and Clerks, employed at the Central Registration Office in New Orleans, have listed the party affiliation of some persons of plaintiffs' class registered since 6th day of August, 1965 to be that of the "States Rights" party when in fact no such preference was indicated by the registrant.

7. The foregoing acts are committed by the defendants and

and their agents in the course of their duties as officials of the State of Louisiana and under color of Statutes Regulations, Customs and Usages of the State of Louisiana.

8. By the provisions of Louisiana Revised Statutes Title 18, Sec. 4, the defendant A. P. Gallinghouse is required to faithfully and impartially perform the duties imposed upon him by the discriminatory practices employed by him and his deputies against members of the plaintiffs' class, he has violated this oath of office; the defendant John J. McKeithen, in his capacity as chief executive of the State of Louisiana, is responsible for and chargeable with the acts of the Registrars appointed, by him, including defendant A. P. Gallinghouse; the defendants comprising the Board of Registration of the State of Louisiana, defendants John J. McKeithen, Vail M. Delony and C. C. Aycock, are empowered and authorized by Louisiana Constitution, Article 8 section 17 to remove defendant A. P. Gallinghouse has violated his oath of office but the defendants comprising the Board of Registration have failed and neglected to remove the said A. P. Gallinghouse from office, and have thereby ratified the acts of discrimination described above and are therefore chargable with these acts.

9. That, by the action of defendant A. P. Gallinghouse in requiring persons attempting to register to vote subsequent to August 6, 1965 to present more complete documentation of their identity and residence than those who applied to register before that date, the said defendant has disenfranchised that group of persons who do not possess such documentation and that by this administrative procedure has imposed upon this group a bill of pains and penalties and contravened and violated rights guaranteed by to the plaintiff members of this group by Article 1, Section 10 of the United States Constitution; and further these plaintiffs assert that by imposing more exacting standards upon those who have attempted to register subsequent to August 6, 1965 then upon those who made such attempt prior to this date, the defendants have denied to the plaintiffs, who comprise the overshelming majority of the second group, the opportunity to register to vote which discriminates against them and denies to them the equal protection of the

laws as guaranteed by the fourteenth amendment to the United States Constitution.

10. That the requirements of documentation for identity, age and residence, impose on the plaintiffs a vague and unascertainable standard for registration in violation of the due process clause of the 14th amendment, and the provisions of the 15th amendment.

11. The conduct of these defendants has caused to the members of the plaintiffs' class irreparable injury and harm in that they have been and will continue to be disenfranchised, and deprived of their right to register for and vote in the primary election due to be held on the 6th day of November, 1965, in the Parish of Orleans, State of Louisiana, and that the plaintiffs have no adequate remedy at law.

12. Unless this Court grants an immediate temporary restraining order and a preliminary injunction, the plaintiffs will have irrevocably lost the right to register and vote in the forthcoming primary election.

13. Plaintiffs seek a temporary restraining order without notice and hearing on the grounds that each day that the members of plaintiffs; class are denied the opportunity to register works and irreparable harm upon the plaintiffs, and will forever deny to some of them the right to vote in the forthcoming primary election.

WHEREFORE, plaintiffs pray (a) that this Court without hearing and without notice to the defendants issue a Temporary Restraining Order, and upon notice and hearing issue a preliminary injunction and permanent injunction forever restraining these defendants, their agents and employees from impeding, obstructing and denying to these plaintiffs and the members of the class they represent their right to register to vote in Orleans Parish, Louisiana; (b) that each of the defendants be served with said restraining order and that they be required thereby to distribute a copy of the order to each of the Deputy Registrars and Clerks in the Voter Registration Offices in Orleans Parish and publicly post a copy of the order at each of said Registration Offices; (c) that

this court retain jurisdiction of this matter for the purpose of enforcing any injunctive order issued herein and for such other orders and proceedings as may become necessary in connection therewith; (d) and that plaintiffs be awarded thir costs, including reasonable attorneys fees, as well as such other and further relief as may appear to the Court to be equitable and just.

Respectfully submitted:

COLLINS, DOUGLAS & ELIE
ATTORNEYS FOR PLAINTIFFS
2211 DRYADES STREET
NEW ORLEANS, LOUISIANA

BY: Robert F. Collins

OF COUNSEL:

JAMES M. SHELLOW, ESQ.,

CAROL RUTH SILVER, ESQ.,

JOHN M. DARRAH, ESQ.,

EARL J. AMEDEE, ESQ.,

BENJAMIN JOHNSON, ESQ.,

NORMAN FRANCIS, ESQ.

ISREAL M. AUGUSTINE, JR., ESQ.,

JAMES A. SMITH, ESQ.,

REVIUS O. ORTIQUE, ESQ.

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UNITES STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

DAYLIGHT GROCERY COMPANY

and

Case No. 12-CA-2734

MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, affiliated with AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

and

EMPLOYEE COMMITTEE

Party to the Contract

Robert L. Westheimer, Esq., for the General Counsel.
Franklin Reinstine, Esq., Jacksonville, Fla., for the Respondent and the Employee Committee.
Charles R. Isenberg, Esq., Louisville, Ky., and Mr. Robert Ackerman, Jacksonville, Fla., for the Charging Party.

Before: Sidney Sherman, Trial Examiner.

TRIAL EXAMINER'S DECISION

The original charge herein was served upon the Respondent on September 6, 1963, and the complaint issued on December 13, 1963. 1/ The case was heard in Jacksonville, Florida, from February 3 throught 6, 1964. A brief was filed by Respondent after the hearing. The issues litigated were whether Respondent violated the Act by (1) refusing to bargain with the Union, (2) interrogation, threats, and inducements, directed at employee union activities, (3) discrimination against employees because of such activities, (4) contributing assistance and support to a labor organization designated as the Employee Committee, and (5) requesting employees to furnish to Respondent copies of affidavits given by them to a Board Agent.

Upon the entire record, 2/ and my observation of the witnesses, I adopt the following findings and conclusions.

1/ All events hereinafter related occurred in 1963, unless otherwise stated.
2/ The transcript of testimony taken herein is hereby ordered corrected as follows:

Page	Line	
24	10	Insert "if" after "that".
24	12	Change "chance" to "point".
57	1	Period after "contract", and change "since" to "Since". (Continued)

I. The business of Respondent

Daylight Grocery Company, herein called Respondent, is a Florida corporation, and is engaged in the operation of retail food stores in the Jacksonville, Florida, area. Respondent conceded, and I find, that during a recent 12-month period Respondent's gross receipts totaled more than $500,000 and it purchased from points outside Florida goods valued in excess of $50,000. It is found that Respondent is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The labor organization involved

The Respondent stipulated, and I find, that Meat Cutters, Packinghouse and Allied Food Workers, District Union 433, affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, herein called the Union, is a labor organization within the meaning of the Act. 3/

I find further, upon the entire record, that the Employee Committee, herein called the Committee, is a labor organization within the meaning of the Act.

III. The unfair labor practices

The amended complaint alleges that Respondent violated the relevant provisions of the Act by (1) refusing since August 14, to bargain with the Union as the representative of its meat department employees in its nine Jacksonville stores, (2) interrogation of employees, (3) threats of reprisal for Union activities, (4) grants of benefit to discourage Union activities, (5) prohibiting the wearing of Union buttons and discharging employees for wearing such buttons, (6) the discriminatory transfer of an employee, (7) soliciting from employees copies of affidavits given by them to the Board, and (8) contributing assistance and support to the Committee. The answer in substance denies any violation.

2/ (Continued)

Page	Line	
57	3-5	Change the sentence to read: "He said he would check with his client and see if he would sit down for contract, and he never called".

(The foregoing change is based on a stipulation of the parties which is hereby received in evidence as Trial Examiner's Exhibit No. 1.)

183	18	Change "Saturday" to "Sunday".
357	25	"cases" to "caves".
358	14	Change "Christman" to "Westheimer".
365	9	" " " "
422	11	Change "You" to "He".
433	6	Strike "do not".
446	13	"recognition" for "admission".
470	13	Change "a scab" to "another".
496	25	Change "September" to "December".
513	24	"unit" for "union".
522	7	" " "

3/ While the Employee Committee did not join in Respondent's stipulation, as the record shows that the Union was seeking here to represent Respondent's employees for the purpose of collective bargaining, a finding that the Union is a labor organization is amply warranted.

A. Sequence of events

Respondent operates in Jacksonville nine retail food stores, each of which contains a grocery and a meat department. In the nine meat departments Respondent in the summer of 1963, employed about 70 employees, of whom about 60 were colored. 4/ Early in July, the Union made contact with employee Pope, and through him obtained signatures from 39 employees on Union authorization cards. On August 14, the Union transmitted to the Respondent photostatic copies of these cards, together with a letter asserting that the Union represented a majority of the meat department employees, offering to submit the signed cards to a neutral third party for authentication, and requesting that Respondent fix a date for such a card check and for negotiating an agreement.

On August 19, Respondent, by its counsel, replied that it did not believe that the Union represented a majority of Respondent's employees in an appropriate unit, that it questioned the appropriatness of the unit described in the Union's letter, and that it declined to recognize the Union until certified by the Board.

Thereafter, late in August, Pope wore a Union button while at work, and, when questioned by Cohen, Respondent's vice president, explained that the button signified that he was attempting to organize Respondent's employees for the Union. Thereupon Cohen summoned to the scene Respondent's general manager, Christman, who ordered Pope to remove the button, and declared that he was not to wear a button until such time as Respondent's employees were organized, that they would never be organized, that Respondent had "many ways of beating the union" and that employees would be discharged if they wore a Union button. The next day Pope was transferred to the grocery department of another store, and, when he there resumed wearing his Union button, he was again told by Christman that there would be no Union, that Respondent had many ways of beating the Union and that Pope would be well-advised to abandon his union activity. Pope then removed his button but was wearing it again by September 4, when he was told by Japour, a representative of management, that he was being discharged for wearing the button. 5/ About the same time Respondent discharged 18 other employees, admittedly for the same reason as in the case of Pope. All 19 picketed Respondent's stores until September 26, when, after conferences between Respondent and the Union, they were reinstated with backpay.

In the meantime, on September 1, at its annual employee party, Respondent announced that it was giving each employee a bonus of $150, which was in addition to the usual profit-sharing bonus which had theretofore been distributed in July and December of each year. On September 3, a Union official, Ackerman, met with Respondent's counsel, and engaged in a discussion of the Union's objectives. There is conflicting testimony, which will be considered later, as to whether Ackerman at that time renewed the Union's request for recognition. On September 4, Respondent held a meeting of all its colored meat and grocery employees, to determine the reason for the employees' "unrest." At this meeting the Committee was formed to meet with management and discuss employee relations, and on September 5 Respondent negotiated with the Committee a number of improvements in the working conditions of all its store employees, including substantial wage increases, and Respondent has since met with the Committee on about six occasions to discuss working conditions.

4/ There were in addition about 100 grocery employees, most of whom were colored.

5/ The foregoing findings as to the various "button" incidents are based on Pope's uncontradicted testimony, which I credit.

E. Discussion

1. Interrogation

The complaint alleges, and the answer denies, interrogation by Japour, an admitted supervisor, during August 1963.

Brooks, a Union adherent, testified that about August 16, Japour asked him what he had been signing, and that, when Brooks entered a disclaimer, Japour retorted that he was looking at Brooks' name on a Union card. Shortly thereafter, Japour renewed the discussion and remarked that if the Union did not "go through, things could be rough."

According to Young, about August 17, Japour told her that he had a list of names from the Union and a card with her signature, offering to show it to her; but she falsely denied signing any card, apprehending that she might be discharged for having done so.

Japour admitted that he asked Young if she had signed a card, but denied any interrogation of other employees. As to Young, he stated that his purpose was to verify the information in the Union's August 14 letter that she had signed a Union card. 6/ However, while this purpose might have validated his inquiry, 7/ if he had observed the safeguards of the Blue Flash case, 8/ in view of his failure to do so, it is necessary to find his interrogation unlawful, particularly in the context of the other unfair labor practices found below.

While Japour denied the interrogation and threat imputed to him by Brooks, I credit Brooks on the basis of demeanor and in view of the circumstantiality of his testimony, and find, for the same reasons as in the case of Young, that such interrogation violated Section 8(a)(1) of the Act. 9/

2. Threats

I have already credited Brooks' testimony regarding the statement by Japour about August 16, that, if the Union did not prevail, "things could be rough." As this implied that the Respondent would visit reprisals on the employees for their Union activities, once the Union had departed from the scene, I find that by such threat Respondent violated Section 8(a)(1) of the Act.

As already related, Christman warned Pope, late in August, that employees would be discharged for wearing Union buttons. Moreover, Christman's

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6/ Japour explained that he had seen only a copy of the Union's letter, which had been sent to his home, and which listed Young as a card signer, but was not accompanied by any copies of signed cards.

7/ As he admitted that he had couched his remarks in the form of an inquiry, I so find, notwithstanding Young's testimony that he merely professed to have her card.

8/ Blue Flash Express, Inc., 109 NLRB 951. Accord: Larry Faul Oldsmobile Co., Inc., 138 NLRB 697, enfd. as mod. 316 F. 2d 595 (C.A. 7), where the Board found unlawful the interrogation of employees regarding their having signed union cards, copies of which had already been submitted to the respondent by the union, as in the instant case.

9/ In view of the foregoing findings, it would be redundant to consider whether certain testimony of Whipple, similar to that of Young, but disputed by Japour, also supports a violation finding.

conversation with Pope the following day contained a veiled threat of reprisal against Pope if he did not abandon his Union activities. By the foregoing conduct, Respondent violated Section 8(a)(1).

Furthermore, as Christman's repeated statements that the Respondent had many ways of beating the Union and the employees would never be organized were calculated to impress upon Pope the futility of his Union activities, such statements violated Section 8(a)(1).

Employee Simon testified, without specific contradiction, and I find, that at the employee party given by Respondent on September 1, Christman declared that if "outsiders came in" Respondent would close its stores. In view of the context, I find that this threat was directed at the Union, and violated Section 8(a)(1) of the Act.

3. Inducements

The complaint alleges that in September Respondent violated Section 8(a)(1) by paying bonuses and granting wage increases to induce the employees to reject the Union.

As to the bonuses, it is undisputed that, as related above, Respondent on September 1, gave each employee a bonus of $150, which was over and above the usual profit-sharing bonus distributed in December and July of each year. Christman testified that in October 1962, Respondent's president, Edwards, had promised the employees that he would increase their share of the profits under the existing profit-sharing plan, if they would dispense with the current method of computing such share, and leave the amount to his discretion, and that during the first week of August 1963, Edwards decided, in view of an increase in Respondent's current profits, to pay an extra bonus on September 1. Moreover, according to Christman, it had been the Respondent's practice in prior years to announce in September some new fringe benefit or make a nominal cash disbursement, not exceeding $25.

However, three employees (Harris, Simon, and Whipple) testified that they had at the most only a few days prior notice of the Respondent's intention to pay the $150 bonus on September 1, 1963, and they denied that during the entire period of their employment, ranging up to 5 years, they had received any cash bonus on or about September 1. Even Cowart, a witness for Respondent, who had been in its employ for 23 years, professed inability to recall whether she had in prior years received any bonus about September 1.

Moreover, according to Whipple, in announcing the bonus, Christman stated that it would continue to be paid in future years, but "some outsiders" were bothering the employees, and "if they kept up" the bonus would be discontinued. This was corroborated by Harris, Simon, and Pope. Christman's version of these remarks was that on that occasion he stated, much as he had during prior years, when profit-sharing was discussed, that profits would be shared "as long as we were one happy family," but that "if we were no longer one happy family, everything would come from the union," and Respondent could not promise what would be given. There was no corroboration of this testimony. 10/

Even if it be assumed that Christman's own version did not transcend the limits of free speech, that would not avail the Respondent

10/ Edwards did not testify, although Respondent's counsel was put on notice that an adverse inference might be drawn therefrom.

here, as I credit, in any event, the mutually corroborative testimony of the employee witnesses, which imputed to Christman a clear threat that profit sharing would cease or be diminished if the employees persisted in their Union activities. In view of this finding, it is not necessary to consider whether the extra bonus payment on September 1 was in fact decided upon by management prior to its learning of the employees' Union activities and without regard to such activities. In view of Christman's attempt to impress upon the employees that continuation of the bonus depended upon abstention from Union activities, I find that such bonus was utilized by Respondent as a means of weaning the employees away from the Union, and that Respondent thereby violated Section 8(a)(1).

It is undisputed that on September 5 Respondent, negotiated with the Committee certain improvements in working conditions, including substantial wage increases. In view of my findings below as to the circumstances under which the Committee was formed, there can be little doubt that such concessions were granted to entrench the Committee as the bargaining representative of the employees, at the expense of the Union. Accordingly, I find that by these, as well as other, concessions made to the Committee, Respondent violated Section 8(a)(1).

4. The ban on union buttons and its enforcement

It is not disputed that Respondent on various occasions forbad individual employees to wear Union buttons while at work, and early in September discharged 19 employees for wearing such buttons. Christmas admitted that the buttons were not offensive in any way and that customers had not complained about them. Respondent's brief does not attempt to justify the foregoing conduct but asserts only that the discharged employees were reinstated with backpay. However, that does not suffice to render the issue moot, as the best assurance against any repetition of such conduct is a cease-and-desist order. Accordingly, I find that the Respondent violated Section 8(a)(1) by forbidding its employees to wear Union buttons at work, and that it violated Section 8(a)(3) and (1) by discharging employees for wearing such buttons. 11/

5. Discriminatory transfer

As related above, Pope, the most active Union adherent, was transferred about September 1, from the meat department of one of Respondent's stores to the grocery department of another store. It does not appear that such transfer involved any change in pay. The day before this transfer, Pope had explained to Vice President Cohen that the Union button he was wearing signified that he was attempting to recruit Union adherents, and Christman had forced Pope to remove the button, threatening to discharge all employees who won Union buttons, and vowing to defeat the Union's organizational efforts.

In explaining the transfer, Christmon cited, at first, (1) the fact that Nash, under whom Pope worked, indicated dissatisfaction with Pope's work, and (2) Christman's belief that Pope was discontended because of his frequent past transfers. When asked whether he expected still another transfer to remedy such discontent, Christmas apparently abandoned any reliance on the foregoing matters and for the first time took the position that he transferred Pope on that occasion because he felt he had humiliated Pope in front of other employees by forcing him to remove his Union button,

11/ Kimble Glass Co., 113 NLRB 577, enfd. 230 F. 2d 484 (C.A. 6, 1956); Floridan Hotel of Tampa, Inc., 137 NLRB 1484, and cases there cited.

and he wished to spare Pope the further embarrassment of having to continue to work with those who had witnessed his humiliation.

In view of the foregoing shifting explanations given by Christman, and the abundant, virtually uncontroverted proof of Respondent's Union animus, including the discharge of Pope and others, only a few days after his transfer, for wearing Union buttons, I find that the transfer of Pope to grocery work 12/ was in reprisal for his Union activity, and presumably in the expectation that he would be less effective in proselytizing for the Union among the meat department employees in a different store, particularly in view of his confinement to grocery work there. Accordingly, I find that by Pope's transfer Respondent violated Section 8(a)(3) and (1). 13/

6. Soliciting copies of Board affidavits

It is undisputed that in the fall of 1963 Japour, a supervisor requested various employees to furnish him with copies of the affidavits they had given a Board agent in connection with the General Counsel's investigation of the instant charges. I find that Respondent thereby violated Section 8(a)(1). 14/

7. Assistance to the Committee

It appears that prior to the events herein related, the employees had been represented in their dealings with Respondent by a committee, which had, however, been dormant for about a year before the advent of the Union. On September 4, about 2 weeks after it had rejected the Union's bargaining request, Respondent called a meeting of its colored employees to ascertain the reason for their "unrest." This meeting was attended by the grocery, 15/ as well as the meat department, employees. At this meeting, after a discussion of employee grievances, the suggestion was made that the employees again set up a committee as a vehicle for dealing with management concerning such grievances. According to Black, who became chairman of the new Committee, he was the one who made the suggestion, and Christman corroborated this testimony. However, employees Wilcox and Brooks testified that it was Respondent's president, Edwards, and not Black, who first suggested the formation of the new Committee. Edwards, himself, was not called to rebut this testimony, although Respondent's counsel was put on notice at the hearing that an adverse inference might be drawn from the failure to call Edwards. In view of the foregoing, I infer that Edwards' testimony would not have been favorable to Respondent, and I credit the testimony of Wilcox and Brooks that it was Edwards who first proposed the formation of the Committee. Christman admitted, in any event, that it was Edwards who recommended to the employees that the Committee consist of two representative from each store, to be elected by the employees, which recommendation was promptly adopted. Christman admitted further that during the foregoing meeting he invited the Committee to meet with the Respondent to discuss the employees' problems, thereby in effect recognizing it as the representative of the employees. In addition, it is not disputed that Respondent on September 5, at its own expense, provided a meeting place for the members of the Committee, where they conferred all that day concerning the demands to be submitted to management, and that they were paid for the time so spent. Most of the foregoing demands, including a substantial wage increase, were

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12/ Pope had never before been assigned by Respondent to grocery work.

13/ General Counsel does not seek an order that Pope be reassigned to work in the meat department, presumably because, as Christman testified, he has already been so reassigned.

14/ W. T. Grant Co., 144 NLRB No. 109.

15/ Another union was attempting at the time to organize Respondent's grocery employees.

admittedly granted on September 5, the same day that they were submitted. Since then, Respondent has met with the Committee about six times to discuss working conditions.

Respondent's brief contains only the following regarding the issue of assistance to the Committee:

> As to the Respondent dealing with the Employee Committee, we submit that the Respondent did not unlawfully sponsor or dominate this Employee Committee.

General Counsel does not contend that Respondent dominated the Committee and seeks no disestablishment order. As for the foregoing denial that Respondent had sponsored the Committee, I have already credited the employee testimony that it was Edwards' suggestion that precipitated the formation of the Committee, and there is no dispute that the structure of the Committee was based on Edwards' recommendation, and that it was organized in a climate of assurances by management that the Committee would be recognized as the employees' representative.

I find, therefore, that, by suggesting and encouraging representation of the employees by the Committee, in preference to an outside union, by giving financial assistance to the Committee, by recognizing, and negotiating with it, and by granting concessions to the employees as a result of such negotiations, the Respondent violated Section 8(a)(2) and (1) of the Act. 16/

8. The refusal to bargain

a. The appropriate unit

The complaint alleges, and the answer admits, that the following unit is appropriate for purposes of collective bargaining.

> All meat department employees in Respondent's stores in Jacksonville, Florida, excluding all other employees, guards and supervisors as defined in the Act.

The Union's letter of August 14 in substance requested recognition in the foregoing unit, except that it specified the inclusion of those regular, part-time employees who worked 20 hours or more per week in the meat department. At the hearing the Respondent contended that those regular part-time employees who worked less than 20 hours per week, should also be included, if they worked a sufficient number of hours per week to warrant their inclusion in the unit under the Board's policy relating to the eligibility of part-time employees generally. The General Counsel, on the other hand, insisted on excluding all part-time employees who worked less than 20 hours per week, contending that in prehearing discussions Respondent had agreed to such exclusion and that it should not now be allowed to alter its position.

However, the General Counsel concedes that, absent such alleged prior agreement, the inclusion of part-time employees working less than 20 hours, as proposed by Respondent, would be proper. 17/ As it does not

16/ Guard Services, Inc., 134 NLRB 1753; General Finishers Corporation, 133 NLRB 999, 1010-1011; Air Control Products, Inc., 139 NLRB 607, 621-623.

17/ See fn. 23, below.

appear that General Counsel was prejudiced by any change in Respondent's position, 18/ I see no reason why Respondent may not now seek to include regular, part-time employees who, while spending less than 20 hours a week in meat department work, are so employed a sufficient number of hours to establish their community of interest with the other meat department employees. Accordingly, I find to be appropriate a unit consisting of all Respondent's meat department employees in its Jacksonville, Florida, stores, including regular part-time employees, but excluding guards and supervisors as defined in the Act.

b. The Union's majority status

As already related, on August 14, the Union submitted to Respondent 39 signed cards. At the hearing it was agreed that 5 of these cards should not be counted because they were signed by employees not in the bargaining unit, 19/ so that the Union's valid card showing in its August 14 letter was in fact 34. In addition, the General Counsel would properly count toward the Union's majority on that date the card of Stephens, which was signed on that date, although some hours after the Union's demand letter was mailed, and not referred to in that letter. 20/ The parties agreed at the hearing on the inclusion in the unit of 63 persons as of August 14, 21/ but disagreed as to 10 others. 22/ The General Counsel would exclude all 10 on the ground that 3 of them are supervisors and the other 7 are employed principally in grocery work, and the extent of their (part-time) employment in meat department work is insufficient to warrant their inclusion in the unit. 23/

Even if the 3 alleged supervisors are excluded, the maximum number remaining in the unit would be 70 employees, and the maximum number of valid cards would be 35, 1 short of a majority. As to the 7 part-time employees, I am satisfied that as to 5 (H. Jackson, M. Jackson, Willis, Reed, and Lewis) the evidence preponderates in favor of a finding that they work in the meat department 20 or more hours, which, as even the General Counsel concedes, would warrant including them in the unit. 24/ The remaining

18/ While General Counsel alleged that he had, in reliance on the alleged prior agreement, refrained from introducing in evidence a card signed by an employee who spent less than 20 hours in unit work, he had ample opportunity to introduce that card after Respondent announced its new unit position but made no effort to do so.

19/ See General Counsel's Exhibit No. 2.

20/ See Rea Construction Co., 137 NLRB 1769.

21/ See General Counsel's Exhibit No. 3.

22/ See General Counsel's Exhibit No. 4.

23/ In determining the eligibility of these "dual-function" employees, the governing case is Berea Publishing Co., 140 NLRB 516. In that case, the Board, reversing prior decisions, held that in the future the eligibility of such employees would be determined by the same rules as are applicable to regular, part-time employees generally.

24/ Of these five, the General Counsel offered contrary testimony only with regard to Lewis (by McKinnon) and Reed (by Pope). However, I do not credit such uncorroborated testimony in the face of the mutually corroborative testimony to the contrary by Respondent's witnesses. Moreover, for reasons which sufficiently appear in the record, I would not deem reliable, in any event, any uncorroborated testimony by McKinnon.

two,--Hargrove, and Sapp--represent difficult, border-line cases. 25/ In any event, when the issue is as close at it is here, turning on debatable questions of fact and law, there is no gainsaying the Respondent's contention that it had reason to doubt the Union's August 16 claim. Moreover, it should be noted that, while it is proper to count Stephens' card toward the Union's majority, even though it was signed after the Union's letter was mailed but before it reached the Respondent, it is relevant to consider, in appraising the Respondent's good faith, that it was informed by the Union's letter only of its claim to have 34 (valid) signed cards. Accordingly, even if both Sapp and Hargrove, as well as the 3 alleged supervisors are deemed ineligible to vote, leaving 68 in the unit, the Respondent would still have had reason to believe, on the basis of the Union's own representations, that it had only 34 cards, and hence no majority on August 14. In view of this, no useful purpose would be served by resolving the issue of the Union's majority status on August 14, particularly in view of my findings below that it did acquire such status shortly thereafter.

It is undisputed that, in addition to the 34 valid cards submitted on August 14, the Union, by August 25 had obtained 4 more signed cards, or a total of 38, which concededly represented a majority of the employees in the unit, even if this number is fixed at 74, 26/ as claimed by Respondent. Accordingly, I find that at least on and after August 25, the Union represented a majority of the employees in the appropriate unit.

c. The demands and refusals

On August 19 and September 3

As already noted, on August 14, the Union requested recognition on the basis of its then card showing and on August 19 this request was

25/ Sapp testified credibly that during the 5 weeks (July 25 to August 30) of his employment, he worked in the meat department for 23 hours 1 week and for 5 hours during each of the other weeks. Whether this would or would not suffice to establish his community of interest with the meat department employees is a question on which there is little authority. As to Hargrove, while her testimony was somewhat vague, she insisted that she worked in the meat department at least from 9 to 4 on Fridays, and 9 to 12 on Saturdays, or a total of 10 hours. I deem this testimony by the employee, herself, more reliable than that of her two fellow employees, called by the General Counsel. It is undisputed that, in addition, Hargrove relieved another employee in the meat department for 2 weeks, during the vacation period. The Board has held to be eligible a regular, part-time employee who worked 6 to 12 hours a week. Gulf States Telephone Co., 118 NLRB 1039, 1042. See, also S. G. Tilden, Inc., 129 NLRB 1096, 1097, including in the unit part-time mechanics, some of whom worked only 1 day a week. These cases would seem to support the Respondent's contention for the inclusion of Hargrove.

26/ This number comprises the 73 employees claimed by Respondent to have been in the unit on August 14, plus one employee (Ellis Simon) who was transferred to the unit on August 19, and signed a card that day.

In its brief Respondent contends that the four new cards should not be counted because General Counsel failed to prove that the signatories belonged in the meat department unit. However, this contention overlooks the fact that the parties stipulated to the inclusion in the unit of three of these four employees (See General Counsel's Exhibit No. 3), and that as to the fourth--Ellis Simon--the record shows that on August 19, he was transferred to the meat department of one of Respondent's stores, working there full time until late in December. Accordingly, this contention is rejected.

rejected by Respondent's counsel on the ground, inter alia, that Respondent doubted the Union's majority status. For reasons already stated, no finding has been made as to the Union's majority on that date. In any event, as it is found below that Respondent on subsequent occasions unlawfully refused to bargain with the Union, there is no need to consider further whether there was such a refusal on August 19.

On August 27, Ackerman, the Union's agent, called the office of the law firm which had replied to the Union's August 14 letter on behalf of Respondent, and, upon being referred by one of the members of that firm to Reinstine, 27/ Ackerman arranged a meeting for September 3. At that meeting, according to Ackerman, after informing Reinstine that since August 14 he had secured additional signed cards, which he was prepared to submit for verification, he asked if Reinstine would "sit down and negotiate a contract," whereupon Reinstine promised to check with his client but never again contacted Ackerman. Reinstine took the stand at the hearing and denied categorically that there was any demand by Ackerman for recognition or negotiation of a contract or any offer to him to submit additional cards. According to Reinstine, Ackerman's remarks related principally to "what he was going to do to Daylight Grocery if the union didn't come in," which Reinstine somewhat reluctantly admitted he construed as a threat "based on the fact that he wanted recognition for the union." Even more significant was Reinstine's admission under cross-examination that Ackerman might, in fact, have asked him to set a date for contract negotiations, thereby contradicting the witness' prior categorical denial of any demand by Ackerman for negotiations.

In view of Reinstine's final, reluctant admission at the hearing that Ackerman might have asked for recognition, I do not credit his prior denials on this point nor his denial that Ackerman offered to submit additional cards. 28/

27/ He was Respondent's trial counsel at the hearing.

28/ In his brief, while referring to his denial at the hearing of Ackerman's testimony, Reinstine apparently concedes tacitly the veracity of Ackerman's testimony as follows:

> . . . We submit that these statements by Mr. Ackerman do not constitute a legal or proper demand or request. The Union when it made its letter request for recognition on August 14, submitted authorization cards of 34 employees to the Respondent. By submitting these 34 cards the Union chose the mode of proving its majority status. However, at the meeting on September 3, Mr. Ackerman merely offere four cards without once again submitting the 34 cards previously submitted to the Respondent on August 14. Without a new submission of the 34 cards it was impossible for Respondent to know whether the 34 employees' cards submitted on August 14, were still valid on September 3, and whether there was an appropriate unit. If Mr. Ackerman had, in fact, made a new demand or request for recognition, it was his duty to have submitted the 34 cards previously submitted to Respondent on August 14, since he, as representative of the Union, had chosen the mode of proving the Union's majority. This Mr. Ackerman did not do, and, therefore, not only his statements but his actions do not establish a new demand or request for recognition.

Thus, Reinstine seems to have abandoned any contention that there was no demand for recognition and no offer of cards on September 3, retreating to the position that such demand was defective because Ackerman did not again submit the original 34 cards on September 3, in addition to the 4 new cards.

As already noted, 29/ Respondent's brief contends that Ackerman's September demand was defective because he did not resubmit the 34 old cards, as well as the 4 new cards. No authority is cited for this proposition and I am aware of none. Clearly, a mere resubmission of the old cards would have proved nothing that Respondent did not already know. It may be that Respondent's contention here is that Ackerman should have had the 34 old card reexecuted on September 3. Such a contention assumes that signed cards automatically lose their evidentiary value after a few weeks or months, even though, as here, there is no evidence or contention that the signatories have changed their mind in the interim. I do not believe that is the law.

Respondent also contends in its brief that Ackerman's demand was ineffective because Reinstine had no authority to "accept" any request for recognition. In support of this, the brief cites Reinstine's testimony that he was not authorized to grant or reject any request for recognition, but would have had to submit any such matter to his client. However, this testimony impliedly acknowledges that Reinstine had the power to receive Ackerman's request and transmit it to his client. Moreover, it is clear that, by authorizing its legal counsel to reply to the Union's August 14 demand, Respondent clothed its counsel at least with apparent authority to act as its intermediary in its dealings with the Union, and Ackerman was therefore justified in making his request for recognition through Reinstine, for submission to Respondent. Accordingly, I find that a proper demand was made on September 3. 30/

It is inferrable from Respondent's failure to give Ackerman any answer to his September 3 request either that Reinstine did not advise Respondent of the new bargaining demand, buttressed by the alleged acquisition of new cards, or that he did so advise Respondent and it decided to reject such demand. In either case, Respondent would be chargeable with a refusal to bargain, since in the former case Reinstine's conduct, in taking no action on Ackerman's demand, would be imputable to Respondent. Moreover, the negative reaction of Reinstine, or Respondent, or both to the Union's claim of additional cards indicates that at this point at least Respondent or those acting for it had no genuine interest in ascertaining whether the Union did or did not represent a majority of the meat department employees, but was concerned rather to find "ways of beating the Union." This is clear not only from Christman's remarks along that line to Pope late in August, together with his repeated assertions to the effect that the Union would never achieve recognition, but also from (1) its discrimination against Pope and others early in September for wearing Union buttons, (2) the stressing to employees on September 1 that adherence to the Union would jeopardize their profit-sharing benefits, (3) the threat

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29/ See preceding fn.

30/ While it has been found that the unit in which bargaining was requested by the Union on August 14, and presumably thereafter, improperly excluded regular, part-time employees who spent less than 20 hours a week in meat department work, Respondent does not now contend that this fact invalidated such bargaining request or that Respondent refused to recognize the Union for that reason. In any event, as it has been found that only two of the 74 employees in question spent less than 20 hours in meat department work, and their inclusion in the unit would not affect the Union's majority status as of August 25, it is found that the foregoing defect was not so substantial as to invalidate the Union's bargaining request for purposes of determining whether there was a refusal to bargain after that date. Galloway Manufacturing Corp., 136 NLRB 405, 408-9, and cases there cited.

on September 1 to close the stores if the Union's campaign succeeded as well as other similar threats related above, and (4) the unlawful assistance rendered the Employee Committee, including the hasty recognition of the Committee and the precipitate grant to it of substantial concessions. As the foregoing conduct was manifestly designed to undermine the Union, the conclusion is inescapable that action on Ackerman's September 3 demand was withheld, not because of any honest doubt of the Union's majority status, but in order to gain time within which to destroy such status. It is accordingly found that the Respondent on September 3, unlawfully refused to bargain with the Union, for reasons unrelated to any good-faith doubt of the Union's majority status, 31/ and that Respondent has thereby violated Section 8(a)(5) and (1) of the Act.

On September 23 and 25

As already related, Respondent early in September discharged 19 employees for wearing Union buttons. On September 23 and 25 Ackerman met with Christman to discuss the reinstatement of these employees. According to Ackerman, at both these meetings he proposed that, in addition to reinstating discharged employees, the Respondent grant recognition to the Union, and on September 25, Christman replied, ". . . if they could avoid recognition of our union, they would prefer not to recognize our union or have any dealings with our union." When asked whether Ackerman had on the foregoing occasion proposed to him recognition of the Union, Christman gave the curious answer, "Not to my knowledge." While such a guarded answer might be justified where the witness is asked concerning matters that might have occurred outside of his presence, no such justification exists here where the question related to a matter necessarily within the witness' own knowledge. In view of this, and as I was favorably impressed by Ackerman's demeanor, I credit him and find that on September 23 and 25 Respondent again rejected specific requests for recognition, and the only reason assigned for its action was that it preferred to have no dealings with the Union, no reference being made to any doubt concerning its majority status. I find therefore that on September 23 and 25, Respondent again refused unlawfully to recognize the Union and that such unlawful refusal continued thereafter.

I find further that by recognizing, and negotiating with the Committee, on and after September 5, as the exclusive representative of its meat department employees, among others, the Respondent further violated Section 8(a)(5) and (1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

It having been found that the Respondent violated Section 8(a)(1), (2), (3) and (5) of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

31/ This finding is reinforced by the testimony of Ackerman, which I credit below, as to the reason given him by Christman on September 25 for not recognizing the Union.

It has been found that the Respondent, in violation of Section 8(a)(2) and (1) of the Act, gave unlawful assistance to the Committee by recognizing and contracting with it. Accordingly, it will be recommended that Respondent be ordered to withdraw and withhold all recognition from the Committee, and to cease giving effect to the agreement negotiated with it on September 5, 1963, unless and until the Committee is certified by the Board as the exclusive representative of Respondent's employees. However, Respondent will not be required to vary the terms and conditions of employment established pursuant to such agreement.

Conclusions of Law

1. By interrogation, threats of reprisal and offers of benefits designed to deter their employees from adhering to the Union, the Respondent has interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, and has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. By promulgating and enforcing, through the transfer and discharge of employees, a rule against wearing Union buttons while at work, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. By requesting employees to furnish it with copies of the pretrial statements given by them to a Board agent, Respondent has violated Section 8(a)(1) of the Act.

4. By refusing to bargain with the Union, as the representative of its meat department employees, Respondent has violated Section 8(a)(5) and (1) of the Act.

5. By interfering with the formation of, and contributing support to, the Committee, recognizing it as the representative of its employees and negotiating with it concerning terms and conditions of employment, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(2) and (1) of the Act; and by such recognition and negotiation, in derogation of the status of the Union as the statutory representative of the employees, Respondent has also violated Section 8(a)(5) and (1) of the Act.

RECOMMENDED ORDER

Upon the entire record in the case, and the foregoing findings of fact and conclusions of law, it is recommended that Respondent, Daylight Grocery Company, Jacksonville, Florida, its agents, successors, and assigns, shall be ordered to:

1. Cease and desist from:

(a) Discouraging membership in Meat Cutters, Packinghouse and Allied Food Workers, District Union 433, affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or in any other labor organization of its employees, by discharging employees, discriminatorily transferring employees to different jobs and locations, or in any other manner discriminating against employees in regard to hire or tenure of employment or any term or condition of employment;

(b) Coercively interrogating employees concerning their union membership and activities;

(c) Threatening to shut down its stores and take other economic reprisals because of its employees' Union activities;

(d) Telling employees that it will never recognize or bargain with a union;

(e) Offering employees inducements to abandon their Union activity;

(f) Forbidding employees to wear Union buttons on Respondent's premises and threatening employees with discharge for wearing such buttons;

(g) Requesting employees to disclose the contents of statements given by them to Board agents in connection with a proceeding before the Board;

(h) Interfering with the formation of, and contributing financial and other support to, the Employee Committee or any other labor organization;

(i) Recognizing the Employee Committee as the representative of Respondent's employees for the purpose of collective bargaining, unless and until such Committee is certified by the Board as such representative;

(j) Giving any effect to the collective agreement negotiated with the Employee Committee on September 5, 1963, or to any extension, renewal, or modification thereof;

(k) Refusing to recognize, or bargain with, the Meat Cutters, Packinghouse and Allied Food Workers, District Union 433, affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive representative of all its employees in the meat departments of its stores in the Jacksonville, Florida, area, including regular part-time employees, but excluding guards and supervisors as deined in the Act;

(l) In any other manner, interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist Meat Cutters, Packinghouse and Allied Food Workers, District Union 433, affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other labor organization, to bargain collectively through representative of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such right is affected by the provisos in Section 8(a)(3) of the Act.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from the Employee Committee as the representative of any of its employees for the purpose of dealing with Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms or conditions of employment, unless and until the Board shall certify said Committee as such representative.

(b) Upon request, bargain collectively with Meat Cutters, Packinghouse and Allied Food Workers, District Union 433, affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, as the exclusive representative of the employees in the aforsaid appropriate unit, with respect to rates of pay, wages, hours of employment, or other terms or conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(c) Post at its stores in Jacksonville, Florida, copies of the notice attached hereto marked "Appendix." 32/ Copies of said notice to be furnished by the Regional Director for the Twelfth Region, shall, after being duly signed by the Respondent, be posted immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. Respondent shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other matieral.

(d) Notify the aforesaid Regional Director, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith. 33/

Dated at Washington, D. C.

Sidney Sherman
Trial Examiner

32/ If this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

33/ In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the aforesaid Regional Director, in writing, within 10 days from the date of the Order, what steps the Respondent has taken to comply herewith."

(9-63

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RECEIVED
APR 3 1964
DISTRICT UNION 433
JACKSONVILLE,
FLORIDA

DAYLIGHT GROCERY COMPANY

and

MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, affiliated with AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

and

EMPLOYEE COMMITTEE

Party to the Contract

Case No. 12-CA-2734

ORDER TRANSFERRING CASE TO THE
NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled case having been held before a duly designated Trial Examiner and the Decision of the said Trial Examiner, a copy of which is annexed hereto, having been filed with the Board in Washington, D. C.,

IT IS HEREBY ORDERED, pursuant to Section 102.45 of National Labor Relations Board Rules and Regulations that the above-entitled matter be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D. C., April 1, 1964.

By direction of the Board:

Ogden W. Fields
Executive Secretary

NOTE: Communications concerning compliance with the Trial Examiner's Decision should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Rules and Regulations appearing on the page attached hereto.

Exceptions to the Trial Examiner's Decision in this case must be received by the Board in Washington, D. C., on or before

APR 24 1964

GPO 867-673

D-6266
Jacksonville, Fla.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DAYLIGHT GROCERY COMPANY

and

Case No. 12-CA-2734

MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, affiliated with AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO

and

EMPLOYEE COMMITTEE

RECEIVED
JUN 29 1964
DISTRICT UNION 433
JACKSONVILLE, FLORIDA

Party to the Contract

DECISION AND ORDER

On April 1, 1964, Trial Examiner Sidney Sherman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Trial Examiner's Decision attached hereto. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief. 1/

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner. 2/

1/ Respondent's motion for oral argument is denied because, in our opinion, the record, exceptions, and brief adequately set forth the issues and positions of the parties.

2/ We agree with the Trial Examiner's finding that effective demands for recognition were made by the Union on the Respondent at the meetings held on September 3, 23, and 25, 1963. At that time the Respondent had in its possession copies of 34 authorization cards and was offered 4 additional cards by the Union representative. Even accepting the Respondent's contention regarding the composition of the bargaining unit, the 38 proffered authorizations were enough to give the Union a majority status on those dates. Accordingly, it is unnecessary to consider whether the Union had obtained a majority status on August 14 when it presented the original 34 authorizations to the Respondent.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the Board hereby adopts as its Order, the Order recommended by the Trial Examiner and orders that the Respondent, Daylight Grocery Company, Jacksonville, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order. 3/

Dated, Washington, D. C. JUN 26 1964

Frank W. McCulloch, Chairman

Boyd Leedom, Member

Howard Jenkins, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

3/ Paragraph 1(1) of the Trial Examiner's Recommended Order is amended to read:

"(1) In any other manner, interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist Meat Cutters, Packinghouse and Allied Food Workers, District Union 433, affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities."

The last indented paragraph of the Appendix attached to the Trial Examiner's Decision is amended to read:

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, affiliated with AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, or any other labor organization, to bargain collectively, through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER

of the National Labor Relations Board and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our employees that:

WE WILL upon request, bargain collectively with MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, affiliated with AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, as the exclusive representative of the employees in the unit, set forth below, with respect to rates of pay, wages, hours of employment, or other terms or conditions of employment, and, if an understanding is reached, embody such understanding is a signed agreement.

All employees in the meat departments of our Jacksonville, Florida, stores, including regular, part-time employees, but excluding guards and supervisors as defined in the Act.

WE WILL NOT discourage membership in MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, affiliated with AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, or in any other labor organization of our employees, by discharging employees, discriminatorily transferring employees to different jobs and locations, or in any other manner discriminating against employees in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT interrogate employees concerning union membership or activities.

WE WILL NOT threaten to shut down our stores or take other economic reprisals because of the union activities of our employees.

WE WILL NOT tell employees that we will never recognize or bargain with the aforenamed labor organization or any other labor organization.

WE WILL NOT offer employees inducements to abandon their union activities.

WE WILL NOT forbid employees to wear union buttons on company premises or threaten employees with economic reprisals for failure to remove said buttons.

WE WILL NOT request employees to disclose the contents of statements given by them to Board agents in connection with a Board proceeding.

WE WILL NOT interfere with the formation of, or contribute financial or other support to, the Employee Committee or any other labor organization, or recognize such Committee as the representative of our employees for the purpose of collective bargain, unless and until such Committee is certified by the Board as such representative.

WE WILL NOT give any effect to the collective agreement negotiated with the Employee Committee on September 5, 1963, or to any extension, renewal, or modifiction thereof.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, affiliated with AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, or any other labor organization, to bargain collectively, through representative of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by the provisos in Section 8(a)(3) of the Act.

All our employees are free to become or remain members of any labor organization or to refrain from becoming or remaining members thereof.

DAYLIGHT GROCERY COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Ross Building, 112 East Cass Street, Tampa, Florida, 33602 (Tel. No. 223-4623), if they have any question concerning this notice or compliance with its provisions.

1206734

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22059

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

DAYLIGHT GROCERY COMPANY,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board.

(May 12, 1965.)

Before TUTTLE, Chief Judge and RIVES and BELL, Circuit Judges.

PER CURIAM: The Board found that respondent had violated § 8(a)(1) of the Act through coercive interrogation, threats of reprisal and offers of benefits; § 8(a)(2) through support of an employee's committee; § 8(a)(3) by reason of discriminatory discharges and transfers; and § 8(a)(5) by refusing to bargain. 29 USCA, §§ 158

(a)(1), (2), (3), and (5). The order of the Board is amply supported in fact and in law. It follows that it will be ENFORCED.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

ORDER

This cause coming on to be heard this day upon the Plaintiff's Complaint For Injunction herein and pursuant to the Court's Order to Show Cause and Temporary Restraining Order dated October 25, 1965, and after due notice and hearing and the Court having heard and considered the evidence and the Court being fully advised in the premises, it is upon consideration

ORDERED, ADJUDGED and DECREED that Defendant labor organization and its agents, representatives, officers, employees, attorneys, organizers, members, allies and confederates, and each and every and all persons acting at the direction or request of in concert with or cooperation with them, or any of them, and all the Defendants cease and decist from:

(a) Maintaining more than five (5) peaceful pickets and five (5) relief pickets at Plaintiff's stores located in Duval County, Florida at (1) 2257 West Edgewood Avenue; (2) 1315 Kings Road; and (3) 3000 Moncrief Road; said relief pickets are to remain in a separate block from the patrolling pickets;

(b) Maintaining more than two (2) peaceful pickets and two (2) relief pickets at Plaintiff's other stores in Duval County, Florida; said relief pickets are to remain in a separate block from the two (2) patrolling pickets;

(c) Gathering or parking at or near Plaintiff's stores in Duval County, Florida, except in accordance with (a) and (b) above;

(d) Patrolling immediately in front of the entrances or exits to Plaintiff's parking lots or stores and hindering, preventing or obstructing, by any means whatsoever, ingress or egress to or from Plaintiff's stores in Duval County, Florida;

(e) Interfering with, assaulting, molesting, intimidating, coercing

or threatening, cursing, following, making gestures toward, or directing any violence or threats of violence toward Plaintiff, its officers, agents, employees, customers, and their families, homes and property;

This injunction shall remain in full force and effect until the further Order of this Court and the Court retains jurisdiction over the parties hereto and this matter for such further Orders as may be meet and proper.

DONE AND ORDERED this 28th day of October, 1965.

/s/ John M. McNatt
Judge

trial 2-13-'66

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CHANCERY NO. 65-6039-E

DAYLIGHT GROCERY COMPANY, a corporation,

Plaintiff,

v.

MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, AFL-CIO

and

ROBERT ACKERMAN, individually and as an officer and representative of Meat Cutters, Packinghouse and Allied Food Workers, District Union 433, AFL-CIO

and

WILLIE L. COLLINS, MARION E. WILLIS, SAMMY WITHERSPOON, JUANITA SHARP, LILLIE MAE SMITH, ELLIS SIMON, ELIJAH BUCKMAN, ELIJAH HOLMES, DANETTE WHIPPLE, ROBERT TREMBLE, CLEO BENJAMIN, ALBERTHA McGREGOR, and WILLIAM POPE, individually and as members and representatives of a class to which they belong,

Defendants.

DIVISION - C

20 8 stores managed by Negroes
90% Negro employees

this is not an original proceeding to enjoin

Cf. didn't intend to enjoin everybody in the world only those in labor dispute

This is a Civil Rights Case East as

ORDER TO SHOW CAUSE

This cause came on for hearing on the Motion of the Plaintiff alleging violations of the Order heretofore made, issued and entered in the above-entitled case and dated October 28, 1965, and the Court having heard and considered the evidence; it is

ORDERED, ADJUDGED and DECREED that MOSES DAVIS, 1621 Hurst Plaza, Jacksonville, Florida, LEVI MINEY WILCOX, 340 Belfort Street, Jacksonville, Florida, and JAMES J. EDGE, 1493 Groethe Street, Jacksonville, Florida, individually and as members and representatives of a

Young Adults etc. v.

Edwards v McKee 202 F 2d
Hughes v. Superior 339 U.S. 460

58 LRRM 2087 USDC Mo. 1964
210 F. Supp 418 Holt

class to which they belong and the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, and its agents, representatives, officers, employees, members, allies and confederates and each and every and all persons acting at the direction or request of or in concert with or cooperation with it, and each of them, be and appear before the at Room 210 Duval County Courthouse, Jacksonville, Florida, above-entitled Court at 11:00 A.M., on February 14, 1966, and then and there to show cause, if any they have, why they should not be bound and restrained and legally required to obey the said Order and cease and desist from violations thereof.

DONE and ORDERED in Chambers at Jacksonville, Florida, this 11th day of February, A. D. 1966.

John H. Crawford

CIRCUIT JUDGE.

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA. IN CHANCERY.

NO. 65-6039-E DIVISION - C

DAYLIGHT GROCERY COMPANY,
a corporation,

Plaintiff,

vs.

MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, AFL-CIO

and

ROBERT ACKERMAN, individually and as an officer and representative of Meat Cutters, Packinghouse and Allied Food Workers, District Union 433, AFL-CIO

and

WILLIE L. COLLINS, MARION E. WILLIS, SAMMY WITHERSPOON, JUANITA SHARP, LILLIE MAE SMITH, ELLIS SIMON, ELIJAH BUCKMAN, ELIJAH HOLMES, DANETTE WHIPPIE, ROBERT TRIMBLE, CLEO BENJAMEN, ALBERTHA McGREGOR, and WILLIAM POPE, individually and as members and representatives of a class to which they belong,

Defendants.

O R D E R

THIS CAUSE came on to be heard this day pursuant to the Court's order to show cause, dated February 11, 1966, and after due notice and hearing and the Court having heard and considered the evidence and being fully advised in the premises, it is

ORDERED, ADJUDGED AND DECREED that Moses Davis, 1621 Hurst Plaza, Jacksonville, Florida; Levi Miney Wilcox, 340 Belfort Street, Jacksonville, Florida; and James J. Edge, 1493 Groethe Street, Jacksonville, Florida, individually and as

members and representatives of a class to which they belong; the Southern Christian Leadership Conference and its agents, representatives, officers, employees, members, allies and each and every and all persons acting at the direction or request of or in concert with or cooperation with it and the Jacksonville Christian Leadership Conference, and its agents, representatives, officers, employees, members, allies, and each and every and all persons acting at the direction or request of or in concert with or cooperation with it, be and they are hereby made party defendants to the injunction entered by this Court on October 20, 1965, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that Moses Davis, 1621 Hurst Place, Jacksonville, Florida; Levi Kinsey Wilcox, 340 Belfort Street, Jacksonville, Florida; and James J. Edge, 1493 Greathe Street, Jacksonville, Florida, individually and as members and representatives of a class to which they belong; the Southern Christian Leadership Conference and its agents, representatives, officers, employees, members, allies and each and every and all persons acting at the direction or request of or in concert with or cooperation with it and the Jacksonville Christian Leadership Conference, and its agents, representatives, officers, employees, members, allies and each and every and all persons acting at the direction or request of or in concert with or cooperation with it, be and are hereby temporarily restrained from picketing at any of the Plaintiff's stores located at Jacksonville, Duval County, Florida, and to cease and desist from:

a. Gathering or parking at or near Plaintiff's stores in Duval County, Florida;

b. Patrolling immediately in front of the entrances or exits to Plaintiff's parking lots or stores and hindering, preventing or obstructing, by any means whatsoever, ingress or egress to or from Plaintiff's stores in Duval County, Florida;

c. Interfering with, assaulting, molesting, intimidating, coercing or threatening, cursing, following, making gestures toward, or directing any violence or threats of violence toward Plaintiff, its business, its officers, agents, employees, customers, and their families, homes and property.

This temporarily restraining order shall remain in full force and effect until the further Order of this Court and the Court retains jurisdiction over the parties hereto and this matter for such further Orders as may be meet and proper.

The bond, in the amount of $1,000.00, given by the Plaintiff under the injunction entered by this Court on October 28, 1965, shall remain the same.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 15th day of February, A. D. 1966.

/s/ John M. McNatt
CIRCUIT JUDGE

IN THE CIRCUIT COURT IN AND FOR DUVAL COUNTY, FOURTH JUDICIAL CIRCUIT OF FLORIDA. IN CHANCERY. NO. 65-6039-E. DIVISION "C".

DAYLIGHT GROCERY COMPANY, a corporation,

Plaintiff,

v.

MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, AFL-CIO, et al.,

Defendants.

CONTEMPT JUDGMENT

This cause came on for hearing on the plaintiff's charge that the restraining order issued herein on February 15, 1966, had been violated by the defendants MOSES DAVIS, JAMES J. EDGE, and others hereinafter named, and the Court having heard the evidence and finding:

(a) The defendants MOSES DAVIS and JAMES J. EDGE did on February 19, 1966, knowingly and willfully violate the restraining order issued herein on the 15th day of February, 1966, by picketing, patroling and interfering with plaintiff's business and employees, and its customers, at plaintiff's store located at 1315 Kings Road, Jacksonville, Duval County, Florida.

(b) The other parties hereinafter named violated said restraining order but did not knowingly and willfully violate the same.

And the Court having considered the evidence and the argument of counsel and being advised in the premises, it is

ORDERED, ADJUDGED and DECREED:

1. The defendant MOSES DAVIS and the defendant JAMES J. EDGE are, and each of them is, in contempt of Court, and said defendants are, and each of them is, hereby adjudged to be in con-

tempt of Court.

2. For such contempt the defendant MOSES DAVIS is hereby sentenced to be confined to the Duval County Jail for the full period of six (6) months; provided that after serving fifteen (15) days of such sentence, said defendant may purge himself of contempt by filing in this cause a statement in writing signed by said defendant containing his assurance that he will not, directly or indirectly, violate or in anywise plan, instigate or encourage any other person or persons to violate said order of the Court in the future.

3. For such contempt the defendant JAMES J. EDGE is hereby sentenced to be confined to the Duval County Jail for the full period of six (6) months; provided that after serving fifteen (15) days of such sentence, said defendant may purge himself of contempt by filing in this cause a statement in writing signed by said defendant containing his assurance that he will not, directly or indirectly, violate or in anywise plan, instigate or encourage any other person or persons to violate said order of the Court in the future.

4. The respondents ERVIN SEXTON, PAUL ARNABOLDI, HOLLIS P. HALL, MARY LOU HARMELING, DAN HARMELING, BRUCE WILLIAMS, DANIEL FINE, JAMES LITTLE and EDWARD J. FINE did on February 19, 1966, violate the said restraining order, but did not knowingly and willfully do so, and each of said respondents is hereby discharged, and the bond for each of them is hereby cancelled and annulled.

5. Upon the filing of an appeal by any defendant and the filing in this cause of a good and sufficient bond in the sum of One Thousand ($1,000.00) Dollars, and the approval thereof by the Court or by the Clerk, further proceedings as to such appellant shall be stayed and he shall be forthwith released from custody; such bond to be conditioned that the appellant shall pay all costs,

damages and expenses occasioned by the appeal and by reason of the stay of proceedings, and that the defendant filing such bond shall diligently prosecute his appeal, and in the event said appeal be dismissed or the said judgment and sentence be affirmed, he shall be personally forthcoming to answer and abide the final order, sentence or judgment which may be passed in the premises by the Appellate Court, and that in case the cause is remanded that such appellant shall personally be and appear before this Court on the first Monday following the filing of the mandate of the Appellate Court to answer in the premises and not to depart from the Court without leave thereof, then such obligation to be null and void, else to remain in full force, effect and virtue.

b. Each appellant shall file a separate bond.

DONE and ORDERED at Jacksonville, Duval County, Florida, this 24rd day of February, A. D. 1966, to evidence judgment entered in Open Court the 22nd day of February, 1966.

(S) JOHN M. McNATT
CIRCUIT JUDGE.

Copies to:

Reinstine, Reinstine & Panken
Daniel R. Coffman, Jr., Esq.
Louis Corbin, Esq.
Earl Johnson, Esq.
Dale Carson, Sheriff of Duval County, Florida.

IN THE CIRCUIT COURT, DUVAL COUNTY, FLORIDA. FOURTH JUDICIAL CIRCUIT OF FLORIDA. IN CHANCERY.

No. 65-6039-E Division C

DAYLIGHT GROCERY COMPANY, a corporation,

Plaintiff,

v.

MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, AFL-CIO, et al.,

Defendants.

NOTICE OF APPEAL

The Defendants, JAMES J. EDGE and MOSES DAVIS, take and enter their appeal to the District Court of Appeals for the First District of Florida to review the order, judgment or decree of the Circuit Court for Duval County, Florida, bearing date the 23rd day of February, A. D. 1966, entered in the above styled cause and recorded in Official Records Volume 2557, Page 679, on the 23rd day of February, A. D. 1966, and all parties to said cause are called upon to take notice of the entry of this appeal.

/s/ Louis C. Corbin

Louis C. Corbin, Attorney for Defendants.
301 Guaranty Life Bldg., 137 E. Forsyth St.
Jacksonville, Florida 32202

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal has been furnished D. R. Coffman, Jr., Esquire, 1623 Barnett Bank Building, Jacksonville, Florida, and Franklin Reinstine, Esquire, 1001 Atlantic Bank Building, Jacksonville, Florida, Attorneys for Plaintiff, by mail this 23rd day of February, A. D. 1966.

/s/ Louis C. Corbin

Louis C. Corbin, Attorney

MOTION FOR ORDER
TO SHOW CAUSE

Comes now Daylight Grocery Company, Plaintiff, and respectfully moves the Court to issue and Order to Show Cause against MOSES DAVIS, LEVI MISEY WILCOX, and JAMES J. EDGE, individually and as members and representatives of a class to which they belong, and the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, and its agents, representatives, officers, employees, attorneys, members, allies and confederates, and each and every and all persons acting at the direction or request of or in concert with or cooperation with it, for why they should not be bound and restrained and legally required to obey the mandates of this Court as set forth in this cause in the Court's Order dated October 28, 1965.

In support of this Motion, Plaintiff respectfully shows to the Court the following:

I.

That on October 28, 1965, the above-entitled Court, upon application of the Plaintiff, issued an Order restraining "Defendant labor organization and its agents, representatives, officers, employees, attorneys, organizers, members, allies and confederates, and each and every and all persons acting at the direction or request of in concert with or cooperation with them or any of them, and all Defendants" from doing certain acts set forth in the Order and at the same time issued an Order to Show Cause directing all the Defendants to appear before said Court on October 27, 1965, to show cause, if any they had, why a temporary injunction should not be made and entered in accordance with the terms of the temporary restraining Order entered by the Court on October 28, 1965. (Emphasis added).

II.

That the Defendants appeared before said Court with their counsel on October 27, 1965, and after hearing and the Court having heard and considered the evidence, entered an Order which was signed October 28, 1965.

III.

That in said Order dated October 28, 1965, Defendant labor organization and its agents, representatives, officers, employees, attorneys, organizers, members

THE FOLLOWING PAGES ARE THE BEST

AVAILABLE.

aiders and confederates, and each and every and all persons acting at the direction or request of in concert with or cooperation with them, or any of them, and all the Defendants were ordered, enjoined and restrained from "(a) maintaining more than five (5) peaceful pickets and five (5) relief pickets at Plaintiff's stores located in Duval County, Florida at (1) 2257 West Edgewood Avenue; (2) 1315 Kings Road; and (3) 3000 Blemorial Road; said relief pickets are to remain in a separate block from the patrolling pickets; * * * (b) gathering or packing at or near Plaintiff's stores in Duval County, Florida, except in accordance with (a) and (b) above; (c) patrolling immediately in front of the entrances or exits to Plaintiff's parking lots or stores and hindering, preventing, or obstructing, by any means whatsoever, ingress or egress to or from Plaintiff's stores in Duval County, Florida; (d) interfering with, assaulting, molesting, intimidating, cursing or threatening, cursing, following, making gestures toward, or directing any violence or threats of violence toward Plaintiff, its officers, agents, employees, customers, and their families, homes and property . Said Order further directed: This injunction shall remain in full force and effect until the further Order of this Court and the Court retains jurisdiction over the parties hereto and this matter for such further Order as may be meet and proper." (Emphasis added).

IV.

That on January 16, 1965, and continuing to date, while said Order and injunction was in full force and effect, said MOSES DAVIS, LEVI MENEY WILCOX and JAMES J. EDGE and others whose identity is unknown to Plaintiff but who are members of or cooperating with an organization identified as SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE or "SCLC" wrongfully and unlawfully violated the Order of this Court by maintaining more than five (5) peaceful pickets at Plaintiff's stores at 2257 West Edgewood Avenue and 1315 Kings Road. Said MOSES DAVIS, LEVI MENEY WILCOX and JAMES J. EDGE and other members or supporters of the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE and/or "SCLC" are causing and directing additional individuals to picket and patrol immediately in front of the entrances to Plaintiff's stores located at 1315 Kings Road and 2257 West Edgewood Avenue, which additional pickets are supporting

the Defendant labor organization and working in concert with and cooperating with said labor organization. Said additional pickets are further violating paragraph (e) of the Court's Order by interfering with, intimidating, and coercing Plaintiff's customers as said customers attempt to enter or leave Plaintiff's stores located at 1318 Kings Road and 2257 West Edgewood Avenue. On February 3, 1966, said additional pickets identified as "SCLC" and "JCLC" massed in numbers up to forty (40) pickets immediately in front of the entrances to Plaintiff's store located at 1318 Kings Road. On February 4, 1966, said MOSES DAVIS, LEVI MEDEY WILCOX and JAMES J. EDGE trespassed upon the property of Plaintiff located at 2257 West Edgewood Avenue, where they were asked to leave but refused to do so even after the Duval County Road Patrol attempted to remove said three (3) individuals. As a result thereof, Plaintiff swore out warrants for the arrest of said three (3) individuals, who after preliminary hearing, were bound over to Criminal Court by Justice of the Peace Jesse Leigh.

WHEREFORE, Plaintiff prays that this Court issue an Order to said MOSES DAVIS, LEVI MEDEY WILCOX and JAMES J. EDGE, individually and as members and representatives of a class to which they belong, and the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, its agents, representatives, officers, employees, attorneys, members, allies and confederates, and each and every and all persons acting at the direction or request of or in concert with or cooperation with it, directing them to appear before the Court at a designated time and place, then and there to show cause, if any they have, why they should not be bound and restrained and legally required to obey the mandates of this Court as set forth in the Court's Order dated October 26, 1965, and for all other further relief.

AUSTINE, AUSTINE & PAMIAN

DANIEL A. COFFMAN, JR.

By _____
(Attorneys for Plaintiff)

Addresses of Counsel:
Austine, Austine & Pamian
901 Atlantic Bank Building
Jacksonville, Florida 32202

Daniel A Coffman, Jr.
1621 Barnett Bank Building
Jacksonville, Florida 32202

Sworn to and subscribed before me
this 11th day of February, A.D. 1966
/s/ Betty Bolin
Notary Public, State of Florida at Large
My commission expires May 9, 1967,
Bonded by American Surety Co. of N.Y. (Seal)

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY.

No. 65-6039-E DIVISION C

DAYLIGHT GROCERY COMPANY, a corporation,

Plaintiff,

vs.

MEAT CUTTERS, et al.,

Defendants.

ORDER TO SHOW CAUSE

This cause came on for hearing on the sworn Petition of Plaintiff alleging violations of the Court's Order made, issued and entered in the above-entitled case and dated February 15, 1966, the Court having heard and considered the evidence and affidavit attached to said Petition, it is

ORDERED, ADJUDGED and DECREED that Defendants MOSES DAVIS, 1621 Hurst Plaza, Jacksonville, Florida; LEVI MINEY WILCOX, 340 Belfort Street, Jacksonville, Florida; and JAMES J. EDGE, 1493 Groethe Street, Jacksonville, Florida, individually and as members and representatives of a class to which they belong; and the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE and the JACKSONVILLE CHRISTIAN LEADERSHIP CONFERENCE, 614 West Duval Street, Jacksonville, Florida, be and appear before the above-entitled Court in Court Room 3, Duval County Courthouse, Jacksonville, Florida, at 11.00 A. M. on March 3, 1966, and, then and there to show cause, if any they have, why they should not be punished for contempt as in said Petition alleged, and why they should not be judged guilty of contempt of this Court for violating the terms and provisions of said Order herein referred to as in said Petition.

DONE and ORDERED at Jacksonville, Florida, this 1st day of March, A.D. 1966.

A TRUE COPY (Seal)
DALE CARSON
Sheriff, Duval County, Fla.
Date 3/1/66 Time 5:10 P M
By J. McCoy
DEPUTY SHERIFF

/s/ John M. McNatt
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY.

NO. 65-6039-E DIVISION C

DAYLIGHT GROCERY COMPANY, a corporation,

Plaintiff,

vs.

MEAT CUTTERS, et al.,

Defendants.

PETITION FOR ORDER TO SHOW CAUSE AGAINST PUNISHMENT FOR CONTEMPT

COMES NOW Daylight Grocery Company, Plaintiff, and respectfully petitions the Court to issue an Order To Show Cause Against Punishment of Defendants MOSES DAVIS: LEVI MINEY WILCOX: JAMES J. EDGE, individually and as members and representatives of a class to which they belong; the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, and the JACKSONVILLE CHRISTIAN LEADERSHIP CONFERENCE for violation of the Order of this Court dated February 15, 1966.

In support of this Petition, Plaintiff shows to the Court as follows:

I.

That on February 11, 1966, the above-entitled Court, upon application of the Plaintiff, issued an Order To Show Cause directed to the above-stated Defendants to have them appear before said Court on February 14, 1966, to show cause, if any they had, why they should not be bound and restrained and legally required to obey the Order of the Court dated October 28, 1965, and to cease and desist from violations thereof.

II.

That on February 15, 1966, pursuant to said Order to Show Cause, the above-stated Defendants appeared before the Court, all being represented by counsel, and after hearing and the Court having heard and considered the

evidence, the Honorable John M. McNatt issued his Order dated February 15, 1966, wherein he ordered:

> "that Moses Davis, 1621 Hurst Plaza, Jacksonville, Florida; Levi Miney Wilcox, 340 Belfort Street, Jacksonville, Florida; and James J. Edge, 1493 Groethe Street, Jacksonville, Florida, individually and as members and representatives of a class to which they belong; the Southern Christian Leadership Conference and its agents, representatives, officers, employees, members, allies and each and every and all persons acting at the direction or request of or in concert with or cooperation with it and the Jacksonville Christian Leadership Conference, and its agents, representatives, officers, employees, members, allies, and each and every and all persons acting at the direction or request of or in concert with or cooperation with it, be and they are hereby made party defendants to the injunction entered by this Court on October 28, 1965."

III.

That in said Order dated February 15, 1966, the Court further ordered:

> "that Moses Davis, 1621 Hurst Plaza, Jacksonville, Florida; Levi Miney Wilcox, 340 Belfort Street, Jacksonville, Florida; and James J. Edge, 1493 Groethe Street, Jacksonville, Florida, individually and as members and representatives of a class to which they belong; the Southern Christian Leadership Conference and its agents, representatives, officers, employees, members, allies and each and every and all persons acting at the direction or request of or in concert with or cooperation with it and the Jacksonville Christian Leadership Conference, and its agents, representatives, officers, employees, members, allies and each and every and all persons acting at the direction or request of or in concert with or cooperation with it, be and are hereby temporarily restrained from picketing at any of the Plaintiff's stores located at Jacksonville, Duval County, Florida, and to cease and desist from:
>
> a. Gathering or parking at or near Plaintiff's stores in Duval County, Florida;b. Patrolling immediately in front of the entrances or exits to Plaintiff's parking lots or stores and hindering, preventing or obstructing, by any means whatsoever, ingress or egress to or from Plaintiff's stores in Duval County, Florida; c. Interfering with, assulting, molesting, intimidating, coercing or threatening, cursing, following, making gestures toward, or directing any violence or threats of violence toward Plaintiff, its business, its officers, agents, employees, customers, and their families, home and property."

IV.

That said Defendants did not petition the Court for rehearing and have not filed a notice of appeal of the Court's Order dated February 15, 1966.

V.

That on February 19, 1966, upon the request of Plaintiff, the Court issued an oral Order to the Sheriffs of Duval County, Florida, to attach and keep all persons violating said Order dated February 15, 1966, and to bring them before the Court on February 21, 1966, to be punished for the alleged violation of said Order of the Court. Two such persons attached were Defendants MOSES DAVIS and JAMES J. EDGE. That on February 22, 1966, after continuance at the request of such persons, including Defendants Davis and Edge, said persons attached, all being represented by counsel, were brought before the Court for hearing and the taking of evidence. At the conclusion of said hearing, the Court found, inter alia that Defendants MOSES DAVIS and JAMES J. EDGE were guilty of violating the Court's Order of February 15, 1966, and were in contempt of Court. The Court punished Defendants Davis and Edge who have filed a Notice of Appeal of said contempt findings.

VI.

That on Saturday, February 26, 1966, while the Court's Order of February ~~26~~ DOC 15, 1966, was in full force and effect, MOSES DAVIS: LEVI MINEY WILCOX: JAMES J. EDGE, individually and as members and representatives of a class to which they belong; the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE: and the JACKSONVILLE CHRISTIAN LEADERSHIP CONFERENCE, wrongfully and unlawfully violated said Order of this Court, inter alia, by interfering with Plaintiff's business at the stores located at 1315 Kings Road and 2257 Edgewood Avenue, Jacksonville, Florida, and by gathering and patrolling immediately in front of the entrances and exits to Plaintiff's stores and/or parking lots at the above stated locations and by hindering and obstructing ingress and egress to or from Plaintiff's said stores, all of which is more fully set forth in the affidavit of Rufus Wade Williamson, attached hereto and made a part hereof.

WHEREFORE, Plaintiff prays that this Court issue an Order to Defendants, MOSES DAVIS; LEVI MINEY WILCOX; JAMES J. EDGE, individually and as members and representatives of a class to which they belong; the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE; and the JACKSONVILLE CHRISTIAN LEADERSHIP CONFERENCE, directing them to appear before the Court at a designated time and place, then and there to show cause, if any they have, why they should not be adjudged in contempt for violating the Orders of the Court heretofore issued in the premises; that at such hearing said Defendants be adjudged in contempt and such punishment therefore be meted out to them by the Court as in its discretion it shall deem just, and for all other and further relief.

DATED March 1, 1966.

Sworn to and subscribed before me this 1st day of March, A.D., 1966.

REINSTINE, REINSTINE & PANKEN

DANIEL R. COFFMAN, JR.

/s/ Betty Bolin
Notary Public, State of Florida at Large.
My commission expires: May 9, 1967
(Seal)

By Daniel R. Coffman, Jr.
Attorneys for Plaintiff

Addresses:

Reinstine, Reinstine & Panken
1001 Atlantic Bank Building
Jacksonville, Florida 32202

Daniel R. Coffman, Jr.
1623 Barnett Bank Building
Jacksonville, Florida 32202

STATE OF FLORIDA

COUNTY OF DUVAL

AFFIDAVIT

Before me, the undersigned authority, duly authorized by law to administer oaths and to take acknowledgements, personally appeared RUFUS WADE WILLIAMSON, 4520 Plymouth Street, Jacksonville, Florida, who being by me first duly sworn, deposes and says:

I am Store Manager for Daylight Grocery Company at the Kings Road and Myrtle Avenue store, Jacksonville, Florida. On Saturday, February 26, 1966, at about 12:15 P.M., Moses Davis appeared at the front entrance to my store. He was accompanied by two or three other colored males and all of them proceeded to stop my customers, as they approached the entrance, talk to them, and hand them a SCLC sheet dated February 3, 1966, a copy of which is attached to my affidavit and marked Exhibit "A". At about 12:30 P.M., Moses Davis actually stuck his head in the door and glared at my cashiers. Davis walked up and down the sidewalk on Kings Road in front of my store, stopping my customers as they approached the front door. He also went out onto the street to hand copies of Exhibit "A" to passing motorists, and he went onto our parking lot to talk to customers.

Late in the afternoon James Edge arrived across the street from the store and started handing out copies of Exhibit "A" to anyone around. He did not come across the street to our store side. Edge did not stay around doing this very long - about 30 minutes; however, he came back about 5:00 P.M. and stayed across the street talking to some men.

Levi Wilcox arrived about 4:00 P.M. and talked to Moses Davis who was still stopping customers right in front of our door and handing out the

sheets. Wilcox did not stop or bother any customers and did not hand out anything to them. He left and came back again to talk to Moses Davis but left shortly thereafter.

Our business fell off sharply after Moses Davis arrived on the scene and started stopping and bothering our customers. Business is normally very good on Saturday afternoon, even since the Union started picketing. Many of our customers turned away after Moses Davis stopped them right at the front entrance.

About 4:00 P.M. Daniel Coffman, Jr., one of our labor attorneys, arrived at the store, coming in the rear entrance. Moses Davis spotted Mr. Coffman in the store and started pointing at him and laughing. Mr. Coffman and I went outside to Davis, and Mr. Coffman asked Davis if his attorney, Mr. Corbin, knew what he (Davis) was doing. Davis replied that their lawyer does not "tell the SCLC what to do." Davis was very arrogant and told us to go tell "your judge that I'm back." Davis also told me that Daylight should fire "your lawyer."

Mr. Coffman called Mr. Louis Corbin to tell him about Moses violating the injunction again. Mr. Coffman and I went out to tell Davis that Mr. Corbin wanted to talk to him on the phone but Davis refused to come in and talk to him and said he did not want to talk to Mr. Corbin. Mr. Coffman told Davis that he was violating the injunction by being at our store and interfering with our business and Mr. Coffman suggested to Davis that he leave. Davis just laughed and said "why don't you call the police again.

Davis stayed at the store with a few other young colored men, handing out the sheets and stopping customers, from about 12:15 P.M. to about 6:45 P.M., except for short breaks when he would go across the street to the restaurant.

My brother, George Williamson, manager of our store located at 2257 West Edgewood Avenue, also reported pickets at his store handing out copies of Exhibit "A" on this same day.

I have read the above affidavit and swear that the contents are true and correct to the best of my knowledge and belief.

Sworn to and subscribed before me this
1st day of March, 1966.

Notary Public

My commission expires:

N-E-W-S-L-E-T-T-E-R

FEBRUARY 3,1966

S.C.L.C. ASKS FULL COOPERATION IN DAYLIGHT BOYCOTT

DISCRIMINATION EXISTS IN MANAGEMENT, SALARIES, AND JOB SECURITY. DURING THE WEEK, AN EXPERT FROM THE S.C.L.C. REGIONAL OFFICE, ATLANTA, GEORGIA, CAME TO JACKSONVILLE AND CONDUCTED A THOROUGH INVESTIGATION OF THE DAYLIGHT COMPANY'S PRACTICES. SOME EXAMPLES OF THE DAYLIGHT COMPANY'S PRACTICES ARE:

Starting Date	Job Classification	Average Weekly Wages	Race
6/25/62	Clerk	$110.00	White
8/13/62	Clerk	65.15	Negro
1/5/59	Clerk	63.51	Negro
9/21/62	Meat Cutter	107.03	White
1/23/64	Meat Cutter & Meat Wrapper	59.95	Negro

AND MANY OTHER INFERIOR SALARIES AND JOB TITLES ARE IN DAYLIGHT STORES.

SOME DAYS THE NEGRO EMPLOYEES HAVE TO WORK AS LONG AS 12 AND 13 HOURS.

FULL COOPERATION IS ASKED OF THE PUBLIC IN THE DAYLIGHT STORES BOYCOTT FOR "DISCRIMINATION IS AS CLEAR AS DAYLIGHT"

EXHIBIT "A"

IN THE CIRCUIT COURT IN AND FOR DUVAL COUNTY, FOURTH JUDICIAL CIRCUIT OF FLORIDA, IN CHANCERY. NO. 65-6039-E. DIVISION "C".

DAYLIGHT GROCERY COMPANY, a corporation,

Plaintiff,

v.

MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, AFL-CIO, et al.,

Defendants.

ORDER CONTINUING HEARING

This cause came on for hearing in accordance with the Order to Show Cause entered herein on March 1, 1966, and the defendants MOSES DAVIS, LEVI MINEY WILCOX and JAMES J. EDGE appeared in person. The plaintiff was represented by its attorneys of record. No other parties appeared or were represented by counsel.

Said defendants requested a continuance for the purpose of procuring other counsel, and were advised by the Court that such continuance would be granted, provided that said defendants, and each of them, pledged to the Court that they would not, directly or indirectly, violate the restraining order entered herein on February 15, 1966, and that they would not plan, encourage, aid or abet any other person in the violation of said order until the conclusion of the hearing on the Order to Show Cause, and each of said defendants having in Open Court made said pledge and assured the Court that there would be no violation of said order until the conclusion of the postponed hearing on said Order to Show cause; it is

ORDERED, ADJUDGED and DECREED that the hearing on the Order to Show Cause entered March 1, 1966, is postponed to March

14, 1966, at 9:00 o'clock A.M., in Court Room No. 2, Duval County Courthouse, Jacksonville, Florida, at which time each of the defendants named in said Order to Show Cause shall be and appear before the Court without further notice.

DONE and ORDERED in Chambers at Jacksonville, Duval County, Florida, this 3rd day of March, A. D. 1966.

(S) JOHN M, McNATT
CIRCUIT JUDGE.

Copies to:

Reinstine, Reinstine & Panken
1001 Atlantic Bank Bldg.
Jacksonville, Florida

Daniel R. Coffman, Jr., Esq.
1623 Barnett Bank Bldg.
Jacksonville, Florida

Louis C. Corbin, Esq.
301 Guaranty Life Bldg.
Jacksonville, Florida

Earl M. Johnson, Esq.
625 W. Union Street
Jacksonville, Florida

Moses Davis
1621 Hurst Plaza
Jacksonville, Florida

Levi Mimey Wilcox
340 Belfort Street
Jacksonville, Florida

James J. Edge
1493 Groethe Street
Jacksonville, Florida.

IN THE DISTRICT COURT OF APPEALS
FIRST DISTRICT, STATE OF FLORIDA
Chancery No. 65-6039-E Div. C
Appeal No. H-359

JAMES J. EDGE, and MOSES DAVIS,

Appellants,

v.

DAYLIGHT GROCERY COMPANY, a corporation,

Appellee.

MOTION TO WITHDRAW

NOW comes LOUIS C. CORBIN, Attorney for Appellants in the above-entitled action and moves the Court for leave to withdraw as counsel for Appellants as provided in Rule 2.3 d. (2) Florida Appellate Rules, upon the ground that:

1. At the time of the filing of the Notice of Appeal in this case Louis C. Corbin was told by R. T. Blackwell, an official in the Southern Christian Leadership Conference that the question of whether he, Louis C. Corbin, would be employed to prosecute the Appeal would be decided after Notice of Appeal was filed and Defendant Members of Southern Christian Leadership Conference, JAMES J. EDGE and MOSES DAVIS, were free under bond.

2. On Saturday, February 26, 1966, Louis C. Corbin sent an air-mail letter to R. T. Blackwell in Atlanta, Georgia, informing him that if Louis C. Corbin was not retained by Wednesday, March 2, 1966, to prosecute this Appeal, he, Louis C. Corbin, planned to withdraw.

3. On Thursday, March 3, 1966, Moses Davis placed a telephone call from the office of Louis C. Corbin to R. T. Blackwell in Atlanta, Georgia. Louis C. Corbin was told by Moses Davis at that time that he, Moses Davis, would telephone R. T. Blackwell again later in the afternoon of Thursday,

March 3, 1966, and report to Louis C. Corbin by 5:00 P. M. whether or not Louis C. Corbin was to be retained to prosecute the Appeal. Louis C. Corbin has heard nothing further from Moses Davis or R. T. Blackwell.

Respectfully submitted.

/s/ Louis C. Corbin

LOUIS C. CORBIN
Attorney for Appellants
301 Guaranty Life Building
Jacksonville, Florida 32202

I HEREBY CERTIFY that a copy of the foregoing Motion to Withdraw has been furnished:

MOSES DAVIS, Appellant
614 Duval Street
Jacksonville, Florida
and
JAMES J. EDGE, Appellant
614 Duval Street
Jacksonville, Florida
and
D. R. COFFMAN, JR.
Attorney for Appelle
1623 Barnett Bank Building
Jacksonville, Florida 32202
and
FRANKLIN REINSTINE
Attorney for Appelle
1001 Atlantic Bank Building
Jacksonville, Florida,

by mail this 4th day of March, A. D. 1966.

/s/ Louis C. Corbin

LOUIS C. CORBIN, Attorney

DISTRICT COURTS OF APPEAL OF FLORIDA
FIRST DISTRICT

Case No. M 859

DAYLIGHT GROCERY COMPANY, a Corporation,

Plaintiff

vs

MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, AFL-CIO

and

ROBERT ACKERMAN, individually and as an officer and representative of Meat Cutters, Packinghouse and Allied Food Workers, District Union 433, AFL-CIO

and

WILLIE L. COLLINS, MARION E. WILLIS, SAMMY WITHERSPOON, JUANITA SHARP, LELLIE MAE SMITH, ELLIS SIMON, ELIJAH BUCHMAN, ELIJAH HOLMES, DANETTE WHIPPLE, ROBERT TREMBLE, CLEO BENJAMEN, ALBERTHA McGREGOR, and WILLIAM POPE, individually and as members and representatives of a class to which they belong,

Defendants.

NOTICE OF GENERAL APPEARANCE

To Dayling Grocery Company:

You will please take notice that John D. Due, Jr., Attorney at Law, has been retained by, and hereby appear for, the Defendants named herein above.

Dated this 1st day of March, 1966.

JOHN D. DUE, Jr.
and CARL RAGSDALE, of the
CONGRESS OF RACIAL
EQUALITY and C.O.R.E.
SCHOLARSHIP, EDUCATION
AND DEFENSE FUND,
540½ West Brevard St.
Tallahassee, Florida

by _____
JOHN D. DUE, Jr.

I HEREBY CERTIFY that a copy of the foregoing was mailed to DAYLIGHT GROCERY COMPANY, Plaintiff, c/o Attorney for Plaintiff, Daniel R. Coffman, Jr., and DANIEL R. COFFMAN, JR., 1623 Barnett Bank Building, Jacksonville, Florida 32202, Attorney for Plaintiff, this 1st day of March, 1966.

JOHN D. DUE, Jr.

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

Case No. H 259

MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 463, AFL-CIO

and

ROBERT ACKERMAN, individually and as an officer and representative of Meat Cutters, Packinghouse and Allied Food Workers, District Union 463, AFL-CIO

and

WILLIE L. COLLINS, WILLIAM POPE, MOSES DAVIS, LEVI MINEY WILCOX, JAMES J. EDGE, et al, individually and as members and representatives of a class to which they belong,

Appellants

vs

DAYLIGHT GROCERY COMPANY, a Corporation,

Appellee

MOTION FOR EXTENSION OF TIME TO FILE ASSIGNMENT OF ERRORS

Come now the Appellants in the above styled cause by their undersigned Attorneys, and move the Court to grant an extension of time for assignment of errors on their appeal heretofore entered in this cause on the following grounds:

1. That the undersigned Attorney was retained by Mr. Moses Davis, one of the Appellants hereinabove and representing the Appellants, to enter as counsel in the above styled cause, on this day 7th of March, 1966.
2. On the 7th of March, 1966, the undersigned conferred with Attorney, L.C. Corbin, representing the Appellants above herein and was informed by him that he is the attorney on appeal herein, that this day, March 7, 1966, is the last day for the assignment of errors, that he

has in his possession, the Court records, but did not know where the trial transcript is, and that he has filed herein, a motion to withdraw as counsel, for the reasons stated therein.

3. The undersigned, then conferred with Attorney Earl Johnson of Jacksonville, Florida, an attorney who had previously been retained by Mr. Moses Davis and the other Appellants, and learned that he had in his possession, the transcript, and that he has incurred certain legal costs and expenses.

4. The undersigned has informed Attorneys L.C. Corbin and Earl Johnson, that all legal costs and expenses incurred shall be satisfied.

5. The undersigned Attorney is willing and able to duly prosecute this appeal.

WHEREFORE, the Appellants move this Honorable Court for an extension of time to file assignment of errors.

Dated this 7th day of March, 1966.

JOHN D. DUE, Jr.
and
CARL RACHLIN, of the
CONGRESS OF RACIAL
EQUALITY and CORE
SCHOLARSHIP,
EDUCATION and
DEFENSE FUND
540½ W. Brevard St.
Tallahassee, Florida

By _____
JOHN D. DUE, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed to DAYLIGHT GROCERY COMPANY, Appellee, c/o Daniel R. Coffman, Jr., Attorney for Appellee, and

DANIEL R. COFFMAN, JR., 1623 Barnett Bank Building, Jacksonville, Florida 32202, Attorney for Appellee, this 7th day of March, 1966.

JOHN D. DUK, JR.

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

JANUARY TERM, A. D. 1966

JAMES J. EDGE, and MOSES DAVIS,

Appellants,

- vs -

CASE NO. H-359

DAYLIGHT GROCERY COMPANY, a corporation,

Appellee.

O R D E R

Motion to withdraw as counsel of record in this cause having been considered,

IT IS ORDERED that Louis C. Corbin, counsel of record in this cause is hereby allowed to withdraw as counsel in this appeal.

WITNESS the Honorable John S. Rawls, Chief Judge, and Seal of the Court this 14th day of March, A. D. 1966.

Raymond E. Larson
Clerk

A True Copy

ATTEST:

Grace M. Penn
Deputy Clerk, First District Court of Appeal, Tallahassee, Florida

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAYLIGHT GROCERY COMPANY,
a corporation,

Respondent-Plaintiff,

v. No. 68-211-Civ-J

MEAT CUTTERS, PACKING HOUSE
AND MILLER FOOD WORKERS
DISTRICT UNION 433, AFL-CIO,
et al.,

Petitioners-Defendants.

MOTION TO REMAND ACTION TO STATE COURT

COMES NOW the Respondent-Plaintiff and moves the Court to remand this action to the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, from which court it was removed for the following reasons:

1. That this action is improperly removed to this Court.

2. That this Court is without jurisdiction of this action under said attempted removal.

3. That it affirmatively appears on the face of the Petition for Removal and Other Relief that the Petitioners-Defendants have a right that can be enforced in the courts of the State of Florida for their equal protection of their civil rights as citizens of the United States.

4. That the Petitioners-Defendants have failed to comply with Title 28, U. S. Code, Section 1446 (d) in that said Petitioners have not filed a bond with good and sufficient surety conditioned that the Defendant or Defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

5. That the Petitioners-Defendants have failed to comply with Title 28, U. S. Code, Section 1446 (b) in that said Petitioners have not filed said Petition for Removal within twenty (20) days of the Order of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, being case no. 65-6039-E, dated February 15, 1966, but entered orally by said court on February 14, 1966.

DATED at Jacksonville, Florida this 15th day of March, 1966.

REINSTINE, REINSTINE AND PANKEN

DANIEL R. COFFMAN, JR.

By _____
Attorneys for Respondent-Plaintiff

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF DUVAL

Franklin Reinstine, of lawful age being first duly sworn, states that he is one of the attorneys for the Respondent-Plaintiff herein and that on the 15th day of March, 1966, he deposited in the United States Mails a copy of the Motion to Remand herein with postage fully prepaid thereon, addressed to the Petitioners-Defendants' attorney at the following address, to wit:

John D. Due, Jr.
540 1/2 W. Brevard Street
[redacted]

/s/ Herbert Panken
Notary Public,
State of Florida at large
My Comm Expires Nov. 3, 1969

MAR 16 1966

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAYLIGHT GROCERY COMPANY,
a corporation,

Respondent-Plaintiff,

v. No. 66-211-Civ-J

MEAT CUTTERS, PACKING HOUSE
DISTRICT UNION 433, AFL-CIO,
et al.,

Petitioners-Defendants.

NOTICE OF MOTION TO REMAND ACTION TO STATE COURT

TO: John D. Due, Jr.
Attorney for Petitioners-Defendants
540 1/2 W. Brevard Street
Tallahassee, Florida

PLEASE TAKE NOTICE THAT on the 15th day of March, 1966, the above named Respondent-Plaintiff filed in the United States District Court for the Middle District of Florida at Jacksonville, Florida, a Motion to Remand Action to State Court. A full and true copy of said Motion is herewith served on you and filed with you.

REINSTINE, REINSTINE AND PANKEN

DANIEL R. COFFMAN, JR.

By [signature]
Attorneys for Respondent-Plaintiff

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAYLIGHT GROCERY COMPANY,
a corporation,

Respondent-Plaintiff,

v. No. 66-211-Civ-J

MEAT CUTTERS, PACKINGHOUSE
AND ALLIED FOOD WORKERS,
DISTRICT UNION 433, AFL-CIO,
et al.,

Petitioners-Defendants.

REQUEST TO WAIVE TIME REQUIREMENTS

COMES NOW Respondent-Plaintiff, and pursuant to Rule 7 (F) of the General Rules of this Court, and respectively request the Court to waive the time requirements set out in Rule 7 and to grant an immediate hearing on Respondent-Plaintiff's Motion to Remand Action to State Court. Respondent-Plaintiff requests said expedited procedure because of the emergency nature of the State Court [illegible] this Court. Said State Court case involves an injunction issued under the State of Florida's police power and is immediately concerned with an alleged contempt of a State Court order dated February 15, 1966 in the Duval County Circuit Court case no. 65-6039-E.

DATED at Jacksonville, Florida this 15th day of March, 1966.

REINSTINE, REINSTINE AND PANKEN

DANIEL R. COFFMAN, JR.

By [signature]
Attorneys for Respondent-Plaintiff

Addresses of Counsel:

Reinstine, Reinstine and Panken
1001 Atlantic Bank Building
Jacksonville, Florida

Daniel R. Coffman, Jr.
1623 Barnett Bank Building
Jacksonville, Florida

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAYLIGHT GROCERY COMPANY,
a corporation,

Respondent-Plaintiff,

v. No. 66-211-Civ-J

[redacted]
AND ALLIED FOOD WORKERS,
DISTRICT UNION 433, AFL-CIO,
et al.,

Petitioners-Defendants.

REQUEST FOR ORAL ARGUMENT

COMES NOW the Respondent-Plaintiff and respectively requests the Court to allow Respondent-Plaintiff Oral Argument on its' Motion to Remand Action to State Court. Respondent-Plaintiff estimates the time required for said argument to be thirty (30) minutes.

DATED at Jacksonville, Florida this 15th day of March, 1966.

REINSTINE, REINSTINE AND PANKEN

DANIEL R. COFFMAN, JR.

By _____
Attorneys for Respondent-Plaintiff

Addresses of Counsel:

Reinstine, Reinstine and Panken
1001 Atlantic Bank Building
Jacksonville, Florida

Daniel R. Coffman, Jr.
1633 Barnett Bank Building
Jacksonville, Florida

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAYLIGHT GROCERY COMPANY,
a corporation,

Respondent-Plaintiff,

vs. No. 66-211-Civ-J

MEAT CUTTERS, PACKINGHOUSE
AND ALLIED FOOD WORKERS,
DISTRICT UNION 431, AFL-CIO,
et al,

Petitioners-Defendants.

MEMORANDUM IN SUPPORT OF RESPONDENT-PLAINTIFF'S MOTION TO REMAND ACTION TO STATE COURT

In support of Respondent-Plaintiff's motion to remand action to the State Court, the Respondent-Plaintiff, by its undersigned attorneys, respectfully submits:

1. It affirmatively appears on the face of the Petition for Removal and Other Relief that the Petitioners-Defendants have a right that can be enforced in the courts of the State of Florida for their equal protection of their civil rights as citizens of the United States. This is established at page 4, paragraph 14 of Petitioners-Defendants' petition for removal wherein it alleged that a notice of appeal was filed on behalf of the Defendants on the 23rd of February, 1966, in the District Court of Appeals, First District, State of Florida, being Appeal No. M-359.

Further in support of ground 3 of Respondent-Plaintiff's Motion to Remand Action to State Court, Respondent-Plaintiff cites the following cases: Levitt & Sons, Inc. v. Prince Georges County Congress of Racial Equality, D. C. Md. 1963, 221 F. Supp. 341;

City of Birmingham, Ala. v. Crosbey, D. C. Ala. 1963, 217 F. Supp. 967; N. A. ex rel. Hicks v. Kay, D.C.N.Y. 1964, 230 F. Supp. 962.

2. That the Petitioners-Defendants have failed to comply with Title 28, U. S. Code, Section 1446 (d) in that said Petitioners have not filed a bond with good and sufficient surety conditioned that the Defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

3. That the Petitioners-Defendants have failed to comply with Title 28, U. S. Code, Section 1446 (h) in that said Petitioners have not filed said Petition for Removal within twenty (20) days of the Order of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, [illegible] No. 65-6039-A, dated February 15, 1966, but entered orally by said Court on February 14, 1966.

WHEREFORE, based on the foregoing grounds and authorities cited in the support thereof, Respondent-Plaintiff moves this Honorable Court to remand said action to the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida.

DATED at Jacksonville, Florida this 15th day of March, 1966.

Respectfully submitted,

REINSTINE, REINSTINE & PARKER

DANIEL R. COFFMAN, JR.

By _____

Attorneys for Respondent-Plaintiff

AFFIDAVIT

STATE OF FLORIDA)
: ss.
COUNTY OF DUVAL)

Franklin Reinstine, of lawful age being first duly sworn, states that he is one of the attorneys for the Respondent-Plaintiff herein and that on the 15th day of March, 1966, he deposited in the United States Mails a copy of the above and foregoing Memorandum in Support of Respondent-Plaintiff's Motion to Remand Action to State Court with postage fully pre-paid thereon, addressed to the Petitioners-Defendants' attorney at the following address, to wit: John D. Doe, Jr., Esq., 340 1/2 W. Brevard Street, Tallahassee, Florida.

_____
Notary Public

My Commission expires:_____

THE FOLLOWING PAGES ARE THE BEST

AVAILABLE.

MAR 22 1966

IN THE CIRCUIT COURT IN AND FOR DUVAL COUNTY, FOURTH JUDICIAL CIRCUIT OF FLORIDA, IN CHANCERY. NO. 65-6033-L. DIVISION "C".

[illegible] CORPORATION,

Plaintiff,

v.

[illegible], ET AL.,

Defendants.

O R D E R

This Court having been advised that the above-entitled cause was being removed to the United States District Court, a hearing was held on March 18, 1966, in Court Room No. 2, Duval County Courthouse, Jacksonville, Florida. The defendants named above, [illegible] appeared in Court. They appeared with their attorney, John P. Fox, Jr., and plaintiff was represented by its attorneys.

As the Court was unable to hear testimony on the Order to Show Cause until March 21, 1966, it was suggested by the Court that if each of said defendants would pledge that he would not, directly or indirectly, violate the restraining order entered herein on February 18, 1966, and would not plan, encourage, aid or abet any other person in the violation of said order until the conclusion of the hearing on said Order to Show Cause, each of the defendants would be released from confinement without bail. After conferring with said attorney, each of the defendants made said pledge in Open Court and were forthwith released.

It is, therefore, ORDERED, ADJUDGED and DECREED that the hearing on the Order to Show Cause entered March 1, 1966, is postponed until [illegible], 1966, at 10:00 o'clock A.M., in Court Room

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JAMES T. [illegible],

[illegible],

vs. No. [illegible]-Civ-J

[illegible],
[illegible],
[illegible],
[illegible],
[illegible],
Comby, Florida [illegible],

[illegible].

ORDER

[illegible] and [illegible] already,
his petition to [illegible] and this cause is hereby dismissed.

DONE AND ORDERED at Jacksonville, Florida, this 2nd day of March, 1972.

[illegible]

Copies to counsel of record
and The Honorable John M. McHatt

MAR 26 1966

IN THE DISTRICT COURT OF APPEALS
FIRST DISTRICT, STATE OF FLORIDA
Chancery No. 65-6039-E Div. C
Appeal No. H-359

JAMES J. EDGE, and MOSES DAVIS,

Appellants,

vs.

DAYLIGHT GROCERY COMPANY, a corporation,

Appellee.

MOTION TO DISMISS APPEAL

COMES NOW the Plaintiff, DAYLIGHT GROCERY COMPANY, and moves the Court to dismiss the Appeal of Appellants JAMES J. EDGE and MOSES DAVIS for failure to prosecute their Appeal and to timely file their Assignments of Error pursuant to this Court's Order dated March 14, 1966, and further on the ground that Appellants failed to file their Direction to Clerk pursuant to Rule 3.6(d).

WHEREFORE, Appellee respectfully moves the Court to dismiss said Appeal.

REINSTINE, REINSTINE & PANKEN

DANIEL R. COFFMAN, JR.

By [signature]

Addresses of Counsel:

Reinstine, Reinstine & Panken
1001 Atlantic Bank Building
Jacksonville, Florida

Daniel R. Coffman, Jr.
1623 Barnett Bank Building
Jacksonville, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Dismiss Appeal has been furnished to JOHN D. DUE, ESQ., 540½ West Brevard Street, Tallahassee, Florida, by U. S. Mail this 25th day of March, A. D. 1966.

_____

Attorney

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DAYLIGHT GROCERY COMPANY,
a corporation,

Plaintiff,

v. No. 66-211-Civ-J

MEAT CUTTERS, PACKINGHOUSE
AND ALLIED FOOD WORKERS,
DISTRICT UNION 433, AFL-CIO,
et al,

Defendants.

ORDER

On February 11, 1966, petitioners Moses Davis, James J. Edge, and Levi Minny Wilcox were served with an order of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, directing them to show cause why they should not be bound by and required to obey that court's order of October 28, 1965, temporarily prohibiting certain types of picketing around specified grocery stores owned by Daylight Grocery Company. On February 15, pursuant to the show cause order, a temporary restraining order was entered, directing petitioners to obey the October order.

Despite this action, petitioners continued to picket and were found guilty of contempt on February 19, being later released on a supersedeas bond pending their

appeal of the contempt proceeding to the Florida District Court of Appeal. Once again petitioners engaged in activities allegedly banned by the court order and on March 1, 1966, were ordered to show cause why they should not be held in contempt for a second time. A hearing on this matter was scheduled for 9:00 A.M. on March 14. Around 8:30 A.M. of March 14, however, petitioners' attorney filed a petition for removal in this court.

Respondent Daylight Grocery Company has attacked removal on several procedural grounds. This court need not discuss most of them, for it is clear that removal was not perfected within the 30-day period required by 28 U.S.C. § 1446(b). Petitioners were first served in this case on February 11, 1966, and their time for removal began at that time; although they were directed to obey an earlier order of the state court, the February 11 order was in essence an "application for an injunction against a new party, rather than an ancillary proceeding for contempt of the original injunction against a party bound thereby." Ward v. Congress Constr. Co., 99 Fed. 598, 602 (7th Cir. 1900).

The 30-day period ended on March 13, but because that date was a Sunday, petitioners had an extra day, Monday the 14th, on which date they filed their petition, thus complying with the time requirements. Petitioners did not, however, file a bond as required by 28 U.S.C. § 1446(d).

They now argue, nevertheless, that they could proceed in forma pauperis under the provisions of 28 U.S.C. § 1915. No ruling is required on the question whether the latter provisions override the bond requirement, since no attempt was made by petitioners to proceed in forma pauperis until the suggestion was made at the hearing on March 18 that they could have proceeded in forma pauperis. A defect in meeting the bond requirement is curable, but only before the 30-day removal period expires. See Richlin Advertising Corp. v. Central Fla. Broadcasting Co., 122 F. Supp. 507 (S.D.N.Y. 1954).

Petitioners argue, however, that they are seeking to remove only the second contempt proceeding, for which a show cause order was issued on March 1; therefore, they say, the time period has not yet expired. But any "civil action" removed "must be an independent suit, and not a proceeding supplementary or incidental to another action." 1A, Moore, Federal Practice para. 0.157[4.-11], at 170 (2d ed. 1961). And since the purpose of the contempt proceeding is to make effective the injunction originally entered by the state court, such proceeding is not an independent action. See Ward v. Congress Constr. Co., supra; cf. H. J. Heinz Co. v. Owens, 189 F.2d 505 (9th Cir. 1951), cert. denied, 342 U.S. 905 (1952); In re Heisig, 178 F. Supp. 270, 273 (N.D. Ill. 1959).

Therefore, after due notice and hearing, it is, upon consideration,

ORDERED:

Plaintiff's Motion to Remand is granted, and this cause is hereby remanded to the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida.

DONE AND ORDERED at Jacksonville, Florida, this 19th day of March, 1966.

Signed
[illegible] McRae, JR.

Judge

Copies to counsel

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
FLORIDA

JAMES T. EDGE,

Petitioner

vs

HON. JOHN M. MC NATT,
Judge, Circuit Court of
the Fourth Judicial Circuit
of the State of Florida, in
and for Duval County,

et al

Respondents

* * * * * * * * * * * * * * * *

WRIT OF HEBEAS CORPUS

To: The United States of America, to Dale Carson,
Sheriff of the County of Duval:

We command you, that you have the body of James T. Edge, by you imprisoned and detained, as it is alleged, together with the time and cause of such imprisonment and detention, by whatever name said James T. Edge shall be called or charged, before me at my chambers, in the Federal Building in the city of Jacksonville, County of Duval, State of Florida, on the day of , 1966, at the hour of o'clock, M, to do and receive that which shall then and there be considered concerning said James T. Edge, and have you then and there this writ.

Witness my hand this day of , 1966.

_____
Judge of the United States
District Court

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

CITY OF JACKSONVILLE,

Plaintiff

vs

MOSES DAVIS,

Defendant

CRIMINAL ACTION

NOTICE OF REMOVAL

To: John East Santora, Esq.
Municipal Court Judge
Jacksonville, Florida

and

Recorder,
City of Jacksonville, Florida

PLEASE TAKE NOTICE THAT on the 14th day of March, 1966, the above named Defendant filed in the United States District Court for the Middle District of Florida at Jacksonville, Florida, his Petition for Removal of the within action to that Court. A full and true copy of the said Petition for Removal is herewith served on you and filed with you.

JOHN D. DUE, JR.
Attorney for Petitioner-Defendant

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

CITY OF JACKSONVILLE

Respondent-Plaintiff

vs

MOSES DAVIS

Petitioner-Defendant

CRIMINAL ACTION
No. _____

PETITION FOR REMOVAL AND OTHER RELIEF

To: The Judge or Judges of the United States District Court
for the Middle District of Florida

Your Petitioner respectfully petitions this Court pursuant to Title 28 U.S.C.A. 1443, et seq., for the removal of the above styled proceeding to this Court from the Municipal Court of the City of Jacksonville, Florida, and in support of this Petition shows as follows:

1. A proceeding, as above entitled, is now pending and awaiting trial in the Municipal Court of the City of Jacksonville, Florida, on Tuesday, March 15, 1966, at 8:00 A.M., such proceeding is a criminal proceeding in which Petitioner is a Defendant.

2. Petitioner believes that he has been charged with disorderly conduct by creating a disturbance by refusing to pay grocery bill.

3. Petitioner is a citizen of Jacksonville, Florida, and is a member of the Southern Christian Leadership Conference.

4. Southern Christian Leadership Conference is an organization dedicated to and engaged in peaceful activities in Florida and elsewhere. These activities are aimed at achieving the full and complete integration of Negro citizens into the political and economic life of their communities through improved employment and educational opportunities and the full exercise of local, state and federal franchises.

5. At all times herein mentioned, Petitioner was associated with the Southern Christian Leadership Conference and was engaged in the aforementioned activities.

6. On about February 19, 1966, MOSES DAVIS had been involved in the

labor dispute with the Daylight Grocery Company who had a store on Kings Road and Myrtle, Jacksonville, Florida. The National Labor Relations Board has assumed jurisdiction of this cause under Case No. 12-CA-2734; the Circuit Court for the Fourth Judicial Circuit in and for Duval County, Florida, Chancery No. 65-6039-E, on behalf of the Daylight Grocery Company placed the Defendant and others under an injunction.

Moses Davis, on February 19, 1966, was in one of the Daylight Grocery stores, Kings Road and Myrtle Street, shopping in the said store for groceries and had entered the check-out counter. He was then stopped by one of the bag boys who did not attempt to check the groceries out because this bag boy knew MOSES DAVIS as being one of the leade of the Southern Christian Leadership Conference regarding the labor dispute.

Police Officer, O.W. Comb, was present in the store, and although there was a peaceful and non-violent discussion regarding the price of a bag of peas, Officer Comb immediately arrested MOSES DAVIS and took him to the City Jail and booked him and charged with disorderly conduct and refusing to pay for groceries.

While MOSES DAVIS was in jail, he was then summoned on an order to show cause why he was not in contempt of court of the Circuit Court of the Fourth Judicial Circuit, State of Florida.

7. The abduction and arrest of the Petitioner was carried out with the sole purpose and effect of harrassing and punishing Petitioner to deter him from the exercise of his constitutionally guaranteed and protected rights of freedom of speech as well as his right to support the efforts of Negro citizens of the United States to resist economic exploitation and racial discrimination regarding employment. This action is in contravention of the Fourteenth and Fifteenth Amendments of the Constitution of the United States of America.

8. Petitioner therefore seeks removal as: (a) The City of Jacksonville, through its City Judge, Police Officers, under the guise of prosecuting

Petitioner for the above mentioned offense, is in fact using and abusing its laws in an attempt to deprive Petitioner of equal protection of the law and to deprive him of the rights guaranteed to him by the Constitution and the Laws of the United States. (b) Petitioner is being prosecuted for acts which were done under the color of rights deprived from the First, Fourteenth and Fifteenth Amendments of the United States Constitution as well as the Civil Rights Acts of 1964. (c) Petitioner is unable to enforce his federal rights in the Courts of Florida, and in particular, the Courts of the City of Jacksonville, because the Petitioner advocates the end of economic exploitation of Negro employees and an end to racial segregation and discrimination regarding employment, while the Municipal Court of the City of Jacksonville enforces segregation and discrimination of the above by policy, practice, custom, and usage, violating Section 1981, 42 U.S.C. and the Fourteenth Amendment. (d) The proceedings of the Municipal Court of the City of Jacksonville, being conducted without the minimum due process of notice of the offence charged, does not afford Petitioner the chance to prepare his defense to said charges. The proceedings thereby deprive the Petitioner of his rights to a trial conducted consistent with due process of law as guaranteed him by the Fourteenth Amendment of the United States Constitution.

WHEREFORE, Your Petitioner, Defendant herein, requests the following relief:

1. That this Court assume full jurisdiction over the causes herein, pursuant to 28 U.S.C., Sections 1443, 1446 (a).
2. That the jurisdiction be retained by this Court under 28 U.S.C., Section 1443, and under the sections pertaining to removal under the Civil Rights Act of 1964.
3. That this Court award the Petitioner such other and further relief as to the Court may seem just and proper.

RESPECTFULLY SUBMITTED

JOHN D. DUE, JR.

I, MOSES DAVIS, Defendant and the Above Petitioner, before the undersigned authority, hereby properly verify the above Petition and the statements contained therein to be true according to my information and belief, dated this day of March, 1966.

MOSES DAVIS

Sworn to and subscribed before me

this day of March, 1966.

Notary Public

My Commission Expires:

or

Clerk, United States District Court.

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

DAYLIGHT GROCERY COMPANY, a Corporation, Plaintiff	* * *

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

DAYLIGHT GROCERY COMPANY, a Corporation,	* *
Respondent-Plaintiff	*
vs	*
MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, AFL-CIO, et al,	*
Petitioners- Defendants	*
* * * * * * * * * * * * * * * * * * * *	

PETITION FOR REMOVAL AND OTHER RELIEF

To: The Judge or Judges of the United States District Court for the Middle District of Florida

Your Petitioners, MOSES DAVIS, LEVI MINEY WILCOX, and JAMES J. EDGE, individually and as members and representatives of a class to which they belong, and representing the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE and the JACKSONVILLE CHRISTIAN LEADERSHIP CONFERENCE, respectfully petition this Court pursuant to Title 28 U.S.C.A. 1441, et sequens, for the removal of the above styled proceedings to this Court from the Circuit Court of the Fourth Judicial Circuit of the State of Florida, in and for Duval County, Division C., and in support of this petition show as follows:

1. A proceeding, as above entitled, is now pending and awaiting trial in the Circuit Court of the Fourth Judicial Circuit of the State of Florida, in and for Duval County, such proceeding being a civil proceeding, in which Petitioners are Defendants.

2. Petitioners are ordered to show cause why they should not be punished for contempt in violation of a Court order, made and issued, and entered in the above entitled cause, No. 55-6039-E, Division C, and dated February 15, 1966.

3. Petitioners are citizens of the State of Florida, and are members of the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, whose main offices

are in Atlanta, Georgia, and the JACKSONVILLE CHRISTIAN LEADERSHIP CONFERENCE, Jacksonville, Florida.

4. The SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE is an organization dedicated to and engaged in peaceful activities in Florida and elsewhere. These activities are non-violent and are aimed at achieving the full and complete integration of Negro citizens into the political and economic life of their communities through improved employment and educational opportunities.

5. At all times herein, Petitioners were associated with the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE and were following the philosophy of the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE and were engaged in the aforementioned activities, peacefully and non-violently.

6. At all times herein, the Daylight Grocery Company, Jacksonville, Florida, is under an order of the National Labor Relations Board, Case No. 12-CA-2734, affirmed by the United States Court of Appeals for the Fifth Circuit, Case No. 22059, for violating Sections 158 (a) (1), (2), (3) and (5), 29 USCA.

7. Daylight Grocery Company is an employer of about 200 employees, of whom about 80 per cent are of the Negro race. In the Summer of 1963, a number of employees sought to exercise their right to organize, to form, join, or assist in a labor organization, the Meat Cutters, Packinghouse and Allied Food Workers, District 433, affiliated with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

8. In June, 1964, the National Labor Relations Board, Case No. 12-CA-2734 found Daylight Grocery Company guilty of unfair labor practices, and ordered Daylight Grocery Company to cease and desist therefrom, and to take certain affirmative actions to effectuate the policies of the Law.

9. The above said Union, and the Employee Committee, an unincorporated group associated with the Union, continued to attempt to bargain in good faith with Daylight Grocery Company, which resulted in a strike by many of the employees of the Daylight Grocery Company, in support of the Union and the Employee Committee.

10. On October 28, 1965, upon Daylight Grocery Company's complaint for an injunction herein, Case No. 65-6039-E, Division C, in the Circuit Court of the Fourth Judicial Circuit of the State of Florida, in and for Duval County, and pursuant to the said court's order to show cause and temporary restraining order, an injunction was issued against the Meat Cutters, and certain other defendants.

11. Defendants, Moses Davis, Levi Miney Wilcox, James J. Edge, the Southern Christian Leadership Conference and the Jacksonville Christian Leadership Conference were not named in the injunction above stated, dated October 28, 1965, nor were these persons or groups or organizations, participating, cooperating, or supporting the above said strike.

12. In about January, 1966, Moses Davis, Levi Miney Wilcox, James J. Edge, as individuals, and as members of the Duval County Council for Equal Opportunity, Jacksonville, Florida, were informed that the Daylight Grocery Company, was guilty of violating an order of the National Labor Relations Board, as described above, and that the Daylight Grocery Company was guilty of discriminating in wages, in job discrimination, in upgrading and seniority rosters. Moses Davis, Levi Miney Wilcox, James J. Edge, and others of the Duval County Council for Equal Opportunity changed the name of that organization to the JACKSONVILLE CHRISTIAN LEADERSHIP CONFERENCE, and sought affiliation with the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, and did receive the support of the latter organization and began to picket the Daylight Grocery Company, peacefully and non-violently, and with the distribution of literature.

13. That on February 15, 1966, upon the request of the Daylight Grocery Company, and pursuant to an order to show cause, the Defendants, MOSES DAVIS, LEVI MINEY WILCOX, JAMES J. EDGE, individually and as members and representatives of a class to which they belong, and the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, were ordered, bound, restrained and legally required to obey the order of October 28, 1965, of the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, Chancery No. 65-6039-E, Division C, said order being issued by the Honorable

John M. Mc Natt.

14. That on February 19, 1966, upon the request of Daylight Grocery Company, Defendants named in paragraph 13 of this petition, pursuant to a motion for an order for contempt, were found guilty of contempt. A supersedas bond of One Thousand ($1,000) Dollars was allowed for each of the Defendants. A Notice of Appeal was filed on behalf of the said Defendants, on the 23rd day of February, 1966, in the District Court of Appeals, First District State of Florida, Chancery No. 65-6039-E, Division C, Appeal No. H-359.

15. That on March 1, 1966, upon request of Daylight Grocery Company, an order to show cause was issued against the Defendants described in paragraph 13 of this petition, against punishment for contempt, the hearing of which is to be held at 11:30 A.M. before the Circuit Court of Duval County, Chancery No. 65-6039-E, Division C.

16. That at all times therein, from January 1966, the Defendants described in paragraph 13 of this petition, have been engaged in non-violent, peaceful activities, seeking to urge Daylight Grocery Company to cease and desist from exploiting its employees economically by giving them low wages, and to persuade Daylight Grocery Company to cease discrimination against its employees because of race, regarding wages, job classification, up-grading and seniority rosters, and to persuade Daylight Grocery Company against violating the order of the National Labor Relations Board, Case No. 12-CA-2734. The said peaceful and non-violent activities included picketing, the singing of labor and freedom songs, distribution of literature, such as attached to this petition as Exhibit 'A'.

17. That the Petitioners, as herein described as Defendants, in paragraph 13 of this petition, are unable to protect their federal rights in the Courts of the State of Florida, because the Petitioners advocate the end of racial discrimination and the segregation against Negro employees by the Daylight Grocery Company, by means of peaceful and non-violent picketing, exercising the freedom of speech, while the Circuit Courts of the State of Florida, support segregation and discrimination by policy, custom, and usage, violating Section 1981, 42 U.S.C., and the 14th Amendment, and that the proceedings

in the above said Circuit Court, in and for Duval County, Florida, are without due process of law as described below.

18. The Circuit Court of the Fourth Judicial Circuit of the State of Florida, in and for Duval County, No. 65-6039-E, Division C, has no jurisdiction in this cause on the following grounds:

(a) The cause herein is a labor dispute as defined in Chapter 5, 29 U.S.C.A. Sections 52, and pursuant thereto, such jurisdiction would be in violation of 29 U.S.C.A., Section 101.

(b) The cause herein is pre-empted by the National Labor Relations Board order of June 29, 1964, Case No. 12-CA-2734.

WHEREFORE, your defendants herein, request the following relief:

1. That this Court assume full jurisdiction over the causes herein, pursuant to 28 U.S.C., Sections 1441, et sequens.

2. That jurisdiction be retained by this Court under 28 U.S.C., Section 1443 and under the Sections pertaining to removal under the Civil Rights Act of 1964.

3. That this Court award such other, and further relief as the Court may seem just and proper.

Respectfully submitted.

JOHN D. DUE, JR.
Attorney for Petitioners
540½ W. Brevard St.
Tallahassee, Florida
Tel. No. 222-2317

We, the Defendants, MOSES DAVIS, LEVI MINEY WILCOX, and JAMES J. EDGE, individually and as members and representatives of a class to which we belong, and on behalf of the SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE and the JACKSONVILLE CHRISTIAN LEADERSHIP CONFERENCE, before the undersigned authority, hereby properly verify the above petition and the statements contained therein, to be true according to our information and

belief, this day of March, 1966.

MOSES DAVIS

LEVI MINEY WILCOX

JAMES J. EDGE

Sworn to and subscribed before me
this day of March, 1966.

NOTARY PUBLIC

My Commission Expires:

or

CLER, UNITED STATES DISTRICT COURT

[SAME TO LEVI MINEY BITTCOX, JAMES T. LOGG]

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
FLORIDA

MOSES DAVIS

Petitioner

vs

HON. JOHN M. MC NATT,
Judge, Circuit Court of the
Fourth Judicial Circuit of
the State of Florida, in and
for Duval County;
DALE CARSON, Sheriff,
Duval County;
W.T. WHITE,
Deputy Sheriff, Duval County

Respondents

* * * * * * * * * * * * * * * * *

PETITION FOR WRIT OF HABEAS CORPUS

TO: THE JUDGE OR JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

Relator, MOSES DAVIS, by his undersigned authority and verified petition, respectfully avers that:

COUNT I

A

The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1446 (f), 1447 (a), 2241 (c), (5), 1651 (1958) and Article VI, Cl. 2 and Amendment XIV of the United States Constitution.

B

The undersigned, JOHN D. DUE, JR., relation to the Petitioner, is that he is an attorney to the petitioner and is authorized to act in the petitioner's behalf.

C

That the Relator has a cause of action against the above named persons, is impoverished, whose income is required to provide for his necessities, that no previous application for leave to sue as a poor person has been made in this cause.

D

The Petitioner is now actually, unjustly, and unlawfully imprisoned and restrained of his liberty and detained under color of authority of the State of Florida, in the custody of Dale Carson, Sheriff of Duval County.

E

The imprisonment of the Relator is illegal, based on the averments of the Petitioner's petition for removal attached as Appendix A hereto. The Averments of these paragraphs incorporated herein and verified by the verification of this Petition for Writ of Habeas Corpus.

F

The Relator was summoned to appear before the Honorable JOHN M. MC WATT, Circuit Court of the Fourth Judicial Circuit of the State of Florida, in and for Duval County, at 9:00 A.M., March 14, 1966.

At or near 8:00 A.M., March 14, 1966, the Relator filed the Petition for Removal attached as Appendix A hereto. Upon instructions from his attorney, Relator MOSES DAVIS, served a copy of the petition herein with the Clerk of the Circuit Court, S.Morgan Slaughter, and with Daniel R. Coffman, Attorney for Daylight Grocery Company, at or around 8:30 A.M., March 14, 1966.

At around 11:30 A.M., March 14, 1966, the Relator was arrested by Sheriff Dale Carson, pursuant to an order of the Honorable John M. Mc Natt and he remainsin the County Jail.

At or around 12:30 P.M., March 14, 1966, the undersigned attorney John D. Due, Jr, called the Honorable John M. McNatt and informed him that the cause that had been set before him at 9:00 A.M. had been removed to the United States District Court at 8:00 A.M. and that copies had been served upon the Clerk of the Circuit Court and Attorney Daniel Coffman, at or around 8:30 A.M., and that the State of Florida no longer has jurisdiction over the cause, and that all proceedings before him were void and are void.

The Honorable John M. Mc Natt informed John D. Due, Jr., that he was not informed that the cause had been removed to the Federal Court and that a hearing on the Order to Shaw Cause why Relator is not in contempt was set at 3:00 P.M., March 14, 1966. Attorney John D. Due, Jr. informed the Honorable John M. McNatt that he could not be present.

At or around 4:30 P.M., March 14, 1966, Attorney John D. Due, Jr. was informed by MOSES DAVIS that he, LEVI MINEY WILCOX and JAMES T. EDGE were brought before the Honorable John Mc Natt, but the Court decided not to hear further proceeding but to remand MOSES DAVIS, LEVI MINEY ~~WILCOX~~ WILCOX and JAMES T. EDGE back into the custody of Sheriff Dale Carson until the results of this anticipated Petition for a Writ of Habeas Corpus.

G

On the basis of the foregoing facts, all proceedings and processes were beyond the authority of the State of Florida and all acts are null and void. The Relator's filing a petition of removal with the United States District Court satisfied the jurisdictional requirements of 28 U.S.C. Section 1446 (1958), and filing a copy of the petition with the Clerk of the Circuit Court and serving notice of removal perfected removal, and once that federal jurisdiction attached, and the Circuit Court was entirely deprived of power to act in the Petitioner's case. The orders and processes of the Circuit Court, being void by force of federal law, petitioner is presently held in violation of the Constitution and the laws of the United States and in derogation of the jurisdiction and dignity of this Court.

H

No previous application to this Court or to any federal Court or Judge has been made for a Writ of Habeas Corpus on the grounds alleged.

I

On the showing made in this petition, Petitioner believes that a Writ of Habeas Corpus, or a Rule to Show Cause why a Writ should not issue, should immediately and forthwith be granted, that enforcement or execution of the void judgements, orders, and processes of the Circuit Court, and all further proceedings in that Court or in any other Court of the State of Florida, should be stayed pending further proceedings before this Court, and that Respondents should be ordered to produce before this Court, the body of the Petitioner, and to appear with the records had upon the trial.

WHEREFORE, Petitioner prays the Court:

1. That the Writ of Habeas Corpus, or a rule to show cause why the Writ should not issue immediately and forthwith issue to Respondents and Petitioner be immediately brought before this Court should therefore be made to appear.

2. That the Respondents be required to appear, produce the records, transcripts, process, pleadings and orders of Daylight Grocery Company vs Meat Cutters, et al, Cause No. 55-6039-E, Division C, Circuit Court of the Fourth Judicial Circuit.

3. That after full hearing this Court relieve Petitioner of his unlawful restraint, and sentence.

4. That the Respondents be forthwith ordered to stay all proceedings of any nature in the Circuit Court or in any other Court of the State of Florida, in the removed civil cause against the Petitioner.

5. That the Court enjoin Daylight Grocery Company and the Sheriff of Duval County, Dale Carson, from interfering with reasonable picketing and exercise of freedom of speech by the Petitioner and the members of his class.

6. That the Court grant such further relief as may appear to the Court just and proper in the circumstances.

7. That your Relator may proceed to prosecute the above action without prepayment of costs.

COUNT II

A

The Relator adopts the allegations, motions, and prayers herein, and all allegations, motions and

prayers set forth in the Petition of Removal herein attached as Exhibit "A" on behalf of the Relator.

B

The judgements, orders, and process of the State Court herein, are void ab initio, and that the State Court herein is without jurisdiction, being pre-empted by the National Labor Relations Board, in re Green, 369 U.S. 689 (1962).

JOHN D. DUE, JR.
and
CARL RACHLIN,
CONGRESS OF RACIAL
EQUALITY and C.O.R.E.
SCHOLARSHIP,
EDUCATION and DEFENSE
FUND
540½ West Brevard St.
Tallahassee, Florida

by _____
JOHN D. DUE, JR.

Sworn to and subscribed before
me this day of March, 1966.

_____
Notary Public, Florida at Large

My Commission Expires:

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

ORDER TO SHOW CAUSE

GOOD CAUSE APPEARING therefore and upon the verified petition filed herein:

IT IS HEREBY ORDERED that Honorable John M. McNatt, Judge of the Circuit Court of the Fourth Judicial Circuit of the State of Florida, in and for Duval County; Dale Carson, Sheriff of Duval County; and W.T. White, Deputy Sheriff of Duval County, appear before this Court on the day of , 1966, at the hour of o'clock noon of said day at , Florida, to show cause, if they have any, why a writ of habeas corpus should not be issued as prayed for herein, and that a writ of habeas corpus be served upon the Respondents, John M. McNatt, Dale Carson and W.T. White.

IT IS FURTHER ORDERED that any further proceedings in these causes, be and is hereby stayed until further order of this Court.

IT IS FURTHER ORDERED that the Court allow the Petitioner to proceed in forma pauperis without prepayment of costs.

DONE this day of , 1966, at , Florida.

Judge, United States District Court

IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA. IN CHANCERY.

NO. 65-6039-E DIVISION - C

DAYLIGHT GROCERY COMPANY, a corporation,

Plaintiff,

-vs-

MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, AFL-CIO, et al.,

Defendants.

STIPULATION

WHEREAS, Moses Davis, Levi Miney Wilcox and James J. Edge, individually and as members and representatives of a class to which they belong, and representing the Southern Christian Leadership Conference and the Jacksonville Christian Leadership Conference, Defendants in the above styled cause, hereinafter called "Defendants", desire to perfect an appeal of their petition for removal in the Federal District Court, said petition having been denied; and

WHEREAS, the Plaintiff, Daylight Grocery Company, hereinafter called "Plaintiff", will stipulate and agree to a stay order against any further proceedings in the Circuit Court on the Order to Show Cause dated March 1, 1966 now pending before said Court for the period during which said Defendants are perfecting their appeal on the petition for removal filed by them in the Federal District Court and until the Appellate Court has disposed of said appeal, provided said Defendants

during the period for the taking of said appeal and during the period that the appeal is being determined by the Appellate Court agree as follows: (1) To comply with and abide by this Court's injunction entered against them on February 15, 1966; (2) That they will not directly or indirectly violate or in anywise plan, instigate or encourage any other person, persons or any organization or organizations of a civil rights nature or otherwise to violate the said Injunction Order of this Court dated February 15, 1966; (3) That they will not directly or indirectly visit the neighborhoods surrounding any of the Plaintiff's stores in Jacksonville, Duval County, Florida, for the purpose of encouraging persons, either orally or by any writing, not to trade or to do business with Daylight Grocery Company, or for the purpose of interferring in any way with the business of Plaintiff;

NOW, THEREFORE, in consideration of the premises, the parties hereto stipulate and agree as follows:

1. Defendants stipulate and agree as follows:

(a) That they will comply with and abide by this Court's injunction entered against them on February 15, 1966;

(b) That they will not directly or indirectly violate or in anywise plan, instigate or encourage any other person, persons or any organization or organizations of a civil rights nature or otherwise to violate the said Injunction Order of this Court dated February 15, 1966;

(c) That they will not directly or indirectly visit the neighborhoods surrounding any of the Plaintiff's stores in Jacksonville, Duval County, Florida, for the purpose of

encouraging persons, either orally or by any writing, not to trade or to do business with Daylight Grocery Company or for the purpose of interferring in any way with the business of Plaintiff.

2. So long as the Defendants comply with the above covenants and conditions on their part to be kept and performed, Plaintiff stipulates and agrees to the stay of any further proceedings in the Circuit Court on the Order to Show Cause dated March 1, 1966, now pending before said Court.

3. It is further stipulated and agreed between the parties hereto that said stay order shall be effective only for the period during which said appeal on the petition for removal which the Defendants filed in the Federal District Court is being perfected and until the Appellate Court has disposed of said appeal.

DATED March 25, 1966.

Signed, sealed and delivered in the presence of:

_____

_____

as to Defendants

_____ (SEAL)
Moses Davis

_____ (SEAL)
Levi Miney Wilcox

_____ (SEAL)
James I. Edge

Individually, and as members and representatives of a class to which they belong, and representing the Southern Christian Leadership Conference and the Jacksonville Christian Leadership Conference

DEFENDANTS

DAYLIGHT GROCERY COMPANY

By: _____
Its

(CORPORATE SEAL)

_____

as to Plaintiff

PLAINTIFF

CORE SCHOLARSHIP, EDUCATION and DEFENSE FUND
540½ West Brevard St. Tallahassee, Florida

JOHN D. DUE, Jr.
FLORIDA COUNSEL

Phone 222-2317

April 4, 1966

Mr. Carl Rachlin
General Counsel
CORE
38 Park Row
New York, N.Y. 10038

Dear Carl:

You should damn well know that when a state proceeding has been removed to the Federal Court, the State proceeding is null and void. The State may proceed and play Court if it desires, but I am not going to be there and I told my clients not to be there.

When I called you on the 19th of March, you demonstrated no further interest in the Daylight case because of my running for office, and therefore I expected no further assistance from you, which, until then was oral citations which were not applicable and my development against the Motion to Remand was saved, to some extent, by Anthony Amsterdam.

By the way, I know we must always prove that we are just as smart as the NAACP Legal Defense Fund and its staff of attorneys.

But loyalty to SEDF does not require me to accept Franklin Reider as the brilliant "New York" attorney in re City of Tallahassee vs Spiver Gordon. Frank is a mere second year law school student. A law student is to assist the attorney assigned to the case, not to direct my office. If Frank is being supervised by one of your attorney friends, I would appreciate to know who.

Enclosed are copies of proceedings since those which I have already sent you in re Daylight Grocery Company.

Enclosed is a suit filed on April 1. If you are no longer interested, file a motion to withdraw immediately.

Yours truly,

John D. Due, Jr.

:lf

Enc. (2)

cc: Mr. Marvin Rich
Executive Director
CORE-SEDF
150 Nassau St., Room 1312
New York, N.Y. 10038

April 9, 1966

Dear Tom

You made the rather foolish mistake out of your innate sense of honor to offer some assistance in this Daylight Grocery matter which has been so incredibly fouled up, even by us, recently, in the removal petition as you can see from the order of remand to the State Court. Unhappily I anticipated this problem and mentioned it but alas I am afraid we were nailed dead to rights

But the matter ~~is~~ is still very much alive. John Due (see address below) is considering now a new action in the federal court to restrain the State Court from acting further since the court does not have jurisdiction of the subject matter. Frankly I have told him as follows: (a) that there has been exhaustion of state remedies in light of the remand, which as I understand, from the statute is not appealable.

(b) He ought to demand a hearing on the current contempt proceeding (i.e. the proceeding we attempted to remove to the federal court) and make a motion to the court that it doesn't have jurisdiction of the subject matter, so to ~~set~~ Set the stage for an appeal to the higher Florida Courts. No such motion has ever been addressed to the Court since the original injunction in October, or at any of the subsequent proceedings.

JOHN D. DUE, JR., ATTORNEY AT LAW --- 540½ WEST BREVARD ST. TALLAHASSEE, FLORIDA

This is particularly true since we have got to make some sort of record either eventually, to go back to the Federal Court after exhaustion of state remedies, or if the occasion presents itself for a new removal petition which is doubtful. We will look, even worse than we do, if we have never given the state court a chance to rule, bad as it will be, in light of the recent fiasco removal proceeding.

(c) A suggestion has been made that a new group picket, not a party to the previous proceedings. In light of the federal judge's statement about new parties being a new proceeding perhaps we can try removal again.

The basic situation concerns an effort to organize the Daylight workers this picketing was almost entirely enjoined by the state court. Then the picketing by Jacksonville chapter of Dr M.L. King's organization. A new injunction against them, a copy of which I also enclose; then the contempt proceedings; removal proceedings and here we are.

Your thoughts would be most welcome. I am having difficulty restraining the people who wish to go on picketing. Thanks. Regards

JOHN D. DUE, JR., ATTORNEY AT LAW ---540½ WEST BREVARD ST. TALLAHASSEE, FLORIDA

Form NLRB-4030a
(6-62)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECREE

of the United States Court of Appeals enforcing an Order of the

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

we hereby notify our employees that:

WE WILL upon request, bargain collectively with MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, affiliated with AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, as the exclusive representative of the employees in the unit, set forth below, with respect to rates of pay, wages, hours of employment, or other terms or conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

All employees in the meat departments of our Jacksonville, Florida, stores, including regular, part-time employees, but excluding guards and supervisors as defined in the Act.

WE WILL NOT discourage membership in MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, affiliated with AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, or in any other labor organization of our employees, by discharging employees, discriminatorily transferring employees to different jobs and locations, or in any other manner discriminating against employees in regard to hire or tenure of employment or any term or condition of employment.

WE WILL NOT interrogate employees concerning union membership or activities.

WE WILL NOT threaten to shut down our stores or take other economic reprisals because of the union activities of our employees.

WE WILL NOT tell employees that we will never recognize or bargain with the aforenamed labor organization or any other labor organization.

WE WILL NOT offer employees inducements to abandon their union activities.

WE WILL NOT forbid employees to wear union buttons on company premises or threaten employees with economic reprisals for failure to remove said buttons.

WE WILL NOT request employees to disclose the contents of statements given by them to Board agents in connection with a Board proceeding.

WE WILL NOT interfere with the formation of, or contribute financial or other support to, the Employee Committee or any other labor organization, or recognize such Committee as the representative of our employees for the purpose of collective bargain, unless and until such Committee is certified by the Board as such representative.

Form NLRB-4080b
(6-62)

WE WILL NOT give any effect to the collective agreement negotiated with the Employee Committee on September 5, 1963, or to any extension, renewal, or modification thereof.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist MEAT CUTTERS, PACKINGHOUSE AND ALLIED FOOD WORKERS, DISTRICT UNION 433, affiliated with AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, or any other labor organization, to bargain collectively, through representative of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by the provisos in Section 8(a)(3) of the Act.

All our employees are free to become or remain members of any labor organization or to refrain from becoming or remaining members thereof.

DAYLIGHT GROCERY COMPANY

.....
(Employer)

Dated ..... By .....
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office,

706 Federal Office Building
500 Zack Street
Tampa, Florida 33602
(Tel. No. 228-7711

GPO 931736

U.S. GOVERNMENT PRINTING OFFICE : 1963—O-641765

ATTENTION

S.C.L.C. WORKERS

ARRESTED DEMONSTRATING AT DAYLIGHT GROCERY COMPANY

THE OFFICIALS OF THE JACKSONVILLE BRANCH OF THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE WERE ARRESTED FOR DEMONSTRATING IN FRONT OF THE DAYLIGHT STORE ON EDGEWOOD AVENUE.

S.C.L.C. "BOYCOTT" CONTINUES - YOUR FUL

COOPERATION IS APPRECIATED

546

DECAMP BUS LINES et al. VS. STATE THRUWAY AUTHORITY et al. NEW YORK 1968
(CHARTER BUS LINES USE of RESTAURANT etc. ON THRUWAY)

Box 36
Folder 13

State Historical Society of Wisconsin

Please Retain Original Order

Supreme Court of the State of New York
County of NEW YORK

DECAMP BUS LINES, SOMERSET BUS CO., ROCKLAND COACHES, INC., MANHATTAN TRANSIT CO., LINCOLN TRANSIT CO. and MOHAWK COACH LINES, INC.,

Plaintiffs

against

NEW YORK STATE THRUWAY AUTHORITY, R. BURDELL BIXBY, EDWIN J. FEHRENBACH and ALTON G. MARSHALL,

Defendants

Index No.

Plaintiff designates
NEW YORK
County as the place of trial

The basis of the venue is
MOHAWK COACH LINES, INC. has offices in the County of New York

Summons with Notice

Plaintiff resides at

County of

To the above named Defendant

You are hereby summoned *to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.*

Dated, August 2, 1968

ROBERT E. GOLDSTEIN
Attorney(s) for Plaintiff
Office and Post Office Address
8 West 40th Street
New York, New York 10018

Notice is hereby given to you that, upon your default to appear, or answer the within summons, judgment will be taken against you for the sum of $ with interest from 19 and the costs of this action.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DECAMP BUS LINES, SOMERSET BUS CO., ROCKLAND COACHES, INC., MANHATTAN TRANSIT CO., LINCOLN TRANSIT CO. and MOHAWK COACH LINES, INC.,	
Plaintiffs,	COMPLAINT
-against-	ACTION FOR DECLARATORY JUDGMENT
NEW YORK STATE THRUWAY AUTHORITY, R. BURDELL BIXBY, EDWIN J. FEHRENBACH and ALTON G. MARSHALL,	
Defendants.	

Plaintiffs complaining of the defendants respectfully allege and show to the Court as follows:

1. The plaintiffs are corporations duly authorized to engage in the transportation of passengers in and through the State of New York.

2. The defendant, New York State Thruway Authority, is a Public Corporation created under authority of the Public Authorities Law, known as the "New York State thruway authority act"; and at all times hereinafter mentioned, the defendants, R. Burdell Bixby, Edwin J. Fehrenbach and Alton G. Marshall, were and now are duly appointed members of the New York State Thruway Authority.

3. During all the times hereinafter mentioned, the plaintiffs were and now are motor common carriers authorized to and engaged in the transportation of passengers by motor bus in interstate and foreign commerce, and

intrastate commerce within the State of New York, by virtue of certificates of public convenience and necessity issued by the Interstate Commerce Commission and the New York Public Service Commission.

4. That in providing such transportation by motor bus, the plaintiffs use, have used, and intend to use, the facilities of the New York State "thruway" in the transportation of their passengers by "charter" buses.

5. Heretofore, and on or about January 4, 1968, the defendants imposed a regulation, and posted and published signs on the "thruway" forbidding the plaintiffs from using the restaurants, service areas, and rest room facilities thereupon to the plaintiffs and their passengers on weekends and holidays, from midnight Friday to midnight Sunday, and from midnight to midnight on holidays.

6. The said regulations above referred are illegal, invalid, null and void in that the regulations have not been adopted in accordance with the applicable provisions of the New York State Thruway Authority Act and of the Executive Law.

7. The said regulations are unconstitutional, illegal, invalid, null and void in that the same were not adopted for the purposes authorized to the defendants, but were adopted for purposes other than those permitted by statute.

8. The same rules and regulations violate the articles of the constitution of the State of New York, and

the articles of the constitution of the United States, which articles in substance forbid the passage of laws denying to any person the equal protections of the law of this State or any subdivision thereof, or of the United States.

9. That the defendants have subjected the plaintiffs common carriers and their passengers because of their transportation in "charter" buses to unlawful discrimination and have denied to the plaintiffs and their passengers the equal protection of the laws of this State and of the United States.

10. The said rules and regulations violate the articles of the constitution of the State of New York and the articles of the constitution of the United States, which article in substance provide that no person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by the State or any agency thereof.

11. That the defendants have subjected the plaintiffs, common carriers, and their passengers because of their race or color and by virtue of their economic status as lower income minority groups to unlawful discrimination, and have denied to the plaintiffs and their passengers the equal protection of the laws of this State and of the United States.

12. That the regulations violate the articles of the constitution of the United States, which in substance

reserves to the United States the regulation of interstate commerce.

WHEREFORE, plaintiffs ask for a judgment of this court declaring:

1. That the regulations ostensibly passed by the defendants are void, unconstitutional and ineffective to prevent the plaintiffs from operating their motor buses on the New York State Thruway, and stopping their motor buses and discharging their passengers for the proper use of the rest rooms, restaurants, and service facilities erected thereon by the defendants for the use of the public.

2. That the regulations promulgated by the defendants are void and ineffectual in that they have not been adopted in accordance with the statutes controlling the adoption, filing and publication of such rules and regulations, and

3. That the rules and regulations promulgated by the defendants are void, unconstitutional and ineffective in that they constitute a denial to the plaintiffs and their passengers of the equal protection of laws; and are a discrimination against the civil rights of the plaintiffs and their passengers by reason of their race or color; and that the rules and regulations violate the articles of the constitution of the United States in that they are an illegal interference with and regulation of interstate commerce.

4. That the defendants and all officers and employees thereof, or others acting in their behalf and at

their request, be restrained from enacting, enforcing, maintaining or permitting the maintenance of any rules or regulations or of any sign denying the plaintiffs the use of the thruway and its facilities, all as set forth above.

5. That the plaintiffs have the costs of this action against any defense hereto and that the plaintiffs have such other and further relief as to the court shall seem just and proper.

ROBERT E. GOLDSTEIN
Attorney for Plaintiffs
Office and Post Office Address
8 West 40th Street
New York, New York 10018
736 - 9585

STATE OF NEW YORK)
CITY OF NEW YORK ss:
COUNTY OF NEW YORK)

JOSEPH CASSER, being duly sworn, deposes and says that he is the Secretary of MOHAWK COACH LINES, INC. the corporation named in the within entitled action; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the MOHAWK COACH LINES, INC., the Plaintiff, is because the said MOHAWK COACH LINES, INC. is a domestic corporation corporation, and deponent an officer thereof, to wit its Secretary.

Joseph Casser
JOSEPH CASSER

Sworn to before me this
2nd day of August, 1968.

Joseph Feinstein
JOSEPH FEINSTEIN
Notary Public, State of New York
No. 31-1182960
Qualified in New York County
Term Expires March 30, 1969

GINSBERG, SCHWAB & GOLDBERG
ATTORNEYS AT LAW

19 WEST 44TH STREET
NEW YORK 10036
OXFORD 7-7393

MORTON DAVID GOLDBERG
DAVID E. SCHWAB II
WILLIAM R. GINSBERG

RICHARD DANNAY
MORTON L. PRICE

RECEIVED
AUG 12 1968
SEDF

August 9, 1968

SEDFRE
164 Madison Avenue
New York, New York 10016

Attention: Mr. Marvin Rich

Re: New York State Thruway Authority

Dear Marvin:

As we discussed on the telephone, I am enclosing a copy of the Summons and Complaint in the action brought by Decamp Bus Lines, et al. against New York State Thruway Authority, et al. When you have had a chance to look this over, we can arrange a meeting with Robert E Goldstein, Esq., the attorney for the plaintiffs, and discuss any interest you may have in the action.

Sincerely,

GINSBERG, SCHWAB & GOLDBERG

William R. Ginsberg

WRG:am
Enclosure

MSS SEDFRE
546

Dennis, David et al US Johnson, Paul B, et al Oct., 1964 - Jan., 1965

Box 36
Folder 14

State Historical Society of Wisconsin

Please Retain Original Order

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

DAVID DENNIS, ROBERT MOSES, AARON HENRY and HUNTER MOREY, on their own behalf and on behalf of all others similarly situated, Plaintiffs, vs. PAUL B. JOHNSON, individually and as Governor of the State of Mississippi, CARROLL GARTIN, individually and as Lieutenant Governor of the State of Mississippi, JOE T. PATTERSON, individually and as Attorney General of the State of Mississippi, T. B. BIRDSONG, individually and as Commissioner of Public Safety of the State of Mississippi, JOHN DOE, RICHARD ROE and JANE DOE, the names JOHN DOE, RICHARD ROE and JANE DOE being fictitious, the true names being unknown to plaintiffs, the persons intended thereby to be designated being officials and legislators of the State of Mississippi and its subdivisions, responsible for the enactment, execution and enforcement of its laws, Defendants.	C O M P L A I N T CIVIL ACTION NO. . . . .

C O M P L A I N T

I. STATEMENT AS TO JURISDICTION

1. This is a civil action brought by the plaintiffs on their own behalf and on behalf of others similarly situated for a preliminary and permanent injunction to prevent the deprivation under color of Mississippi law of certain rights, privileges and immunities secured to the plaintiffs by the Constitution of the United States as hereinafter more fully set forth. The suit also seeks a judgment declaring void and unconstitutional certain statutes, rules, regulations and administrative policies and procedures of the defendants whose purpose or effect is to deprive the plaintiffs of their said constitutional rights.

2. Jurisdiction is conferred on this court pursuant to title 42, U. S. Code, sections 1971, 1981, 1983, 1985, 1988; title 28, U. S. Code, sections 1331, 1343, 2201 and 2202, and the Civil Rights Act of 1964.

3. Plaintiffs assert violations by the defendants of the following provisions of the Constitution of the United States: section 10 of Article I; section 2 of Article IV; section 4 of Article IV; Amendments I, IV, V, VI, VII, VIII, XIII, XIV, XV and XXIV. Plaintiffs also assert violations of title 42, U. S. Code, chapter 21, and of the Civil Rights Act of 1957, the Civil Rights Act of 1960 and the Civil Rights Act of 1964.

4. The plaintiffs, DAVID DENNIS, ROBERT MOSES and AARON HENRY, are citizens of the United States and residents of the State of Mississippi. They are members of the Negro race and sue herein on their own behalf and on behalf of all other Negro residents of the State of Mississippi, who constitute a class too numerous to bring before the court. There are common questions of law and fact affecting all members of the class, and common relief is sought.

5. The plaintiff, HUNTER MOREY, is a citizen of the United States and a resident of the State of Mississippi. He is a member of the white race and has in the past and continues to be engaged in lawful and peaceful activities aimed at securing to members of the Negro race who are residents of the State of Mississippi the full enjoyment of the constitutional guarantees contained in the provisions of the Constitution set forth in Paragraph 3 of this complaint and of the rights secured in the Civil Rights Acts set forth in said paragraph. He brings this suit on his own behalf and on behalf of all other persons who have been engaged and are desirous of engaging in such lawful and peaceful activities who constitute a class too numerous to bring before the court. There are common questions of law and fact affecting all members of the class, and common relief is sought.

6. The defendant, PAUL B. JOHNSON, is the Governor and chief executive officer of the State of Mississippi, authorized, empowered and directed by the constitution of the said state to recommend laws to the legislature and to execute laws enacted by it. He is sued herein individually and in his capacity of Governor of the State of Mississippi.

7. The defendant, CARROLL GARTIN, is Lieutenant Governor of the State of Mississippi who possesses and exercises the powers and duties of the Governor in the absence or disability of the Governor, and is also by virtue of his office president of the Senate of the State of Mississippi. He is sued herein individually and in his capacity of Lieutenant Governor of the State of Mississippi.

8. The defendant, JOE T. PATTERSON, is Attorney General of the State of Mississippi who is the chief official of the state responsible for enforcement of the laws of the state. He is sued herein individually and in his capacity of Attorney General of the State of Mississippi.

9. The defendant, T. B. BIRDSONG, is the Commissioner of Public Safety of the State of Mississippi and as such is the chief public official of the state responsible for the preservation of peace and public safety in the state. He is sued herein individually and in his capacity of Commissioner of Public Safety.

10. The defendants, JOHN DOE, RICHARD ROE and JANE DOE, the said names being fictitious and the true names being unknown to the plaintiffs, are a class constituting the appointed and elective legislators and officials of the State of Mississippi and its political subdivisions responsible for the enactment, execution and enforcement of the laws, regulations, procedures and customs of the State of Mississippi and its political subdivisions, including but not limited to the members of the legislature, the heads of executive departments, sheriffs, deputy sheriffs and police chiefs, officials responsible for the public educational system of the State of Mississippi, members of the state judiciary, prosecuting officials and officials in charge of the prisons and jails of the state and its subdivisions. Each of them is sued herein individually and in his official capacity.

II. FACTUAL ALLEGATIONS

11. The defendants herein and their predecessors in office, since the issuance of the Emancipation Proclamation in 1863 and the adoption of the Thirteenth, Fourteenth, Fifteenth and Twenty-Fourth Amendments, have been engaged and continue to be engaged in a conspiracy and a concerted and combined effort to nullify and make ineffective and meaningless the Emancipation Proclamation, The Thirteenth, Fourteenth, Fifteenth and Twenty-Fourth Amendments, all the laws enacted by the Congress of the United States and proclamations, executive orders and administrative rulings and decisions of the United States Government whose purpose it was and is to implement and effectuate the said Emancipation Proclamation and constitutional amendments and, as far as possible, to keep the Negro residents of the State of Mississippi in the same subjugated, enslaved and inferior status as they were prior to the Emancipation Proclamation. In seeking to achieve these ends, and in furtherance of said conspiracy, the defendants have engaged in and are still engaging in innumerable acts violating the rights of Negroes and of others persons seeking to assure the constitutional rights of Negroes, including but not limited to the following:

(a) They have enacted laws constituting bills of attainder and ex post facto laws.

(b) They have denied to the Negroes in the State of Mississippi the privileges and immunities of citizens in the several states.

(c) They have established and maintained in the State of Mississippi a form of government which is not a republican form of government but is in fact a state of lawlessness and tyranny.

(d) They have sanctioned violence against the Negroes in the State of Mississippi, and other persons seeking to assure the constitutional rights of Negroes, and have refused to call upon the Federal Government for protection against domestic violence against Negroes and such other persons.

(e) They have made and enforced laws and otherwise abridged the freedom of speech of Negroes of the State of Mississippi and other persons seeking to assure the constitutional rights of Negroes.

(f) They have made and enforced laws and otherwise abridged the freedom of the press of Negroes of the State of Mississippi and other persons seeking to assure the constitutional rights of Negroes.

(g) They have made and enforced laws and otherwise deprived the Negroes of the State of Mississippi and other persons seeking to assure the constitutional rights of Negroes of the right peaceably to assemble and to petition the government for the redress of grievances.

(h) They have violated the right of Negroes of the State of Mississippi and other persons seeking to assure the constitutional rights of Negroes to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and have issued warrants without probable cause and unsupported by oath or affirmation.

(i) They have deprived the Negroes of the State of Mississippi and other persons seeking to assure the constitutional rights of Negroes of life, liberty and property without due process of law.

(j) They have deprived the Negroes of the State of Mississippi and other persons seeking to assure the constitutional rights of Negroes, the right in criminal prosecutions to a speedy and public trial by an impartial jury, the right to be informed of the nature and cause of the accusations against them, to be confronted with the witnesses against them, to have compulsory process for obtaining witnesses in their favor, to have the assistance of counsel for their defense, and to have other rights and privileges constituting a fair trial.

(k) They have required of the Negroes of the State of Mississippi and other persons seeking to assure the constitutional rights of Negroes, excessive bail and have imposed upon them excessive fines and inflicted upon them cruel and unusual punishment.

(l) They have imposed upon the Negroes of the State of Mississippi slavery, peonage and involuntary servitude other than as punishment for crime

of which the Negroes have been duly convicted.

(m) They have denied to the Negroes of the State of Mississippi and other persons seeking to assure the constitutional rights of Negroes, the equal protection of the laws.

(n) They have solely on account of the race, color or previous condition of servitude of the Negro citizens of the State of Mississippi denied and abridged their right to vote.

(o) They have denied and abridged the rights of the Negro citizens of the State of Mississippi to vote by reason of failure to pay poll taxes.

12. Sometime before April 1, 1964, it became known to the defendants herein that the plaintiffs and the classes on whose behalf they bring this suit, and many American citizens from all parts of the United States, were determined to institute and carry on during the summer of 1964 and thereafter an intensive campaign within the State of Mississippi to help secure to the Negro citizens of Mississippi their rights under the United States Constitution and laws, and to engage in lawful and peaceful activities for that purpose.

13. Plaintiffs and the members of the classes which they represent, have been and are engaged in activities in the State of Mississippi to improve educational opportunities for Negroes, to provide opportunities for Negroes to vote who are not now permitted to vote in Mississippi, to assure to Negroes the right to avail themselves of public facilities and accommodations as well as facilities and accommodations subject to the Civil Rights Act of 1964, and generally to provide due process of law and equal protection of the laws to Negroes who are deprived of these rights in Mississippi. The said activities include but are not limited to the following:

(a) Establishment of schools, some of which are called Freedom schools, to afford education to Negroes in the State of Mississippi who have heretofore been denied equal educational opportunities.

(b) Organization of peaceful campaigns by Negroes in Mississippi to enable them to exercise their right to vote.

(c) Establishment of community centers to explain and promote better methods of enforcing the right to vote, the right to due process of law, the right to equal protection of the laws and other constitutional rights.

14. In furtherance of the conspiracy heretofore alleged and also independent thereof, and with the purpose of frustrating and making ineffective the efforts of the plaintiffs set forth in Paragraph 13 hereof, and to intimidate

and coerce them from pursuing these efforts, the defendants have enacted and caused to be enacted in the 1964 session of the Mississippi Legislature certain statutes (the texts whereof are annexed hereto as exhibits) which are now in full force and effect. These statutes are as follows (because these statutes have not yet been compiled into the Mississippi Code, they are designated here by the number in which they were introduced into either the House or Senate of the Mississippi Legislature):

(a) H.B. 64, which authorizes municipalities to create quarantines and to restrict the movements of citizens where necessary "to enforce the general welfare."

(b) H.B. 227, which provides that "no prisoner shall be placed in the dark hole of the maximum security unit for a longer period than 24 hours," and corporal punishment shall be limited to seven "licks or lashes."

(c) H.B. 321-322, which provide for the construction and segregation of municipal prisons and the transfer of prisoners from municipal and county prisons to the state penitentiary.

(d) H.B. 546, which prohibits and infringes upon the right of peaceful picketing or demonstrating.

(e) H.B. 777, which penalizes as a breach of the peace the failure to comply with the order of an officer to move from a vehicle, to stand up, or to refrain from obstructing a vehicle, or to unbind themselves from one another, or to do any other thing.

(f) H.B. 937, which provides that jurors are to be chosen from the "registration book of voters" instead of as previously from land owners as well as voters. Negroes are prevented from voting in Mississippi and therefore are generally not included in "the registration book of voters."

(g) H.B. 960, which removes from the Youth Court jurisdiction of minors under 21 years of age who are charged with a breach of the peace as defined by H.B. 777, or with picketing, as defined by H.B. 546, as well as under other laws commonly used against peaceful and lawful civil rights demonstrations. This statute increases the penalties against such minors.

(h) S.B. 1515, which provides that certain county courthouses may be closed on Saturdays. These courthouses are and have been the place for voters to register to vote, and have been kept open on Saturdays so that those persons who work during the week would be able to come to the courthouse and register to vote.

(i) S.B. 1517, which increases the maximum permissible penalties for violation of municipal ordinances from a fine of $100 or imprisonment for 30 days to a fine of $300 or imprisonment for 90 days.

(j) S.B. 1526, which authorizes fire departments to go outside city limits and permits municipal authorities to "enter into mutual assistance pacts or agreements with other municipalities in the assignment of personnel, equipment, supplies and material for the purposes of combatting fires, natural and enemy disasters and the prevention of riots or civil disturbance of the peace and tranquility within such municipalities."

(k) S.B. 1545, which penalizes one who "wilfully and maliciously" prints anything to interfere with the trade or business of another.

(l) S.B. 1783, which provides that a voter who seeks to vote at a federal election but has not paid a poll tax must obtain a certificate from the tax collector marked "poll tax not paid" and present such certificate to the voting officials.

(m) S.B. 2016, which provides that when a child is adjudged delinquent, his record may be made available to any Mississippi state agency and upon a second similar adjudication his name is to be published in a newspaper. It further provides that no person who has a charge involving moral turpitude pending against him may be admitted to any institution of higher learning in the State of Mississippi.

(n) S.B. 2043, which repeals and rescinds a provision of Section 6791.5 of the Mississippi Code requiring the Commission on College Accreditation to include in lists of accredited colleges those on the Southern Association and junior college accreditation lists. Tougaloo College, which has been a center of protest in Mississippi against segregation for many years, is and has been upon such accreditation lists and thus entitled to be accredited by the State of Mississippi before enactment of S.B. 2043.

III. CAUSES OF ACTION

15. First Count: Each of the statutes set forth in paragraph 14 is void and unconstitutional by reason of the fact that it was enacted as part and in furtherance of the conspiracy heretofore alleged.

Second Count: Each of the statutes set forth in paragraph 14 hereof is void and unconstitutional by reason of the fact that it was enacted for the purpose of defeating, frustrating and making ineffective the efforts of the plaintiffs and the classes which they represent as set forth in paragraph 13 herein, and each of said statutes has such effect.

Third Count: Each of the statutes set forth in paragraph 14 is void and unconstitutional on its face, irrespective and independent of the purpose for which it was enacted or the method whereby it is implemented and enforced, in that each of the said statutes violates one or more of the constitutional and statutory provisions set forth in paragraph 3 hereof.

Fourth Count: Independent of the purpose for which each of the statutes set forth in paragraph 14 is enacted, and even if not unconstitutional upon their face, each of the said statutes has been and continues to be enforced against the plaintiffs herein and the classes which they represent in an unconstitutional manner so as to deprive the plaintiffs and the classes which they represent of the constitutional and statutory rights and guarantees set forth in paragraph 3 herein.

IV. OTHER ALLEGATIONS

16. This suit involves a genuine case or controversy between the plaintiffs and the defendants because the laws as heretofore set forth have affected and continue to affect the lawful and peaceful activities which the plaintiffs and the classes which they represent have already undertaken and will undertake in 1964, and intimidates and coerces them from exercising their constitutional and statutory rights as aforesaid.

17. The plaintiffs have no adequate remedy at law and will suffer irreparable injury unless a temporary and permanent injunction is granted.

18. Unless the defendants' statutes herein set forth are declared void and unconstitutional, and the defendants are enjoined from enforcing them, plaintiffs and the classes which they represent will be deprived of their constitutional rights to express themselves freely and peacefully, to assemble, to move about freely, to vote and to enjoy the equal protection of the laws and the due process of law. Members of the classes which plaintiffs represent have been and will continue to be arrested, incarcerated, tried and convicted without due process of law and subjected to cruel and unusual punishment.

V. PRAYERS FOR RELIEF

19. The plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, sections 2281 and 2284 of the United States Code, to declare unconstitutional the laws of the State of Mississippi heretofore set forth in paragraph 14.

(2) That the defendants be permanently enjoined from enforcing and effectuating any of the said laws and from making arrests, conducting trials or incarcerating persons by virtue of the said laws, and from in any other way taking action under or by virtue of the said laws.

(3) That a temporary or preliminary injunction pending the trial of the issues be granted to the plaintiffs against the defendants for the relief set forth herein.

(4) That plaintiffs be granted such other and further relief as to the court may seem just and proper.

Attorneys for Plaintiffs:

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By: _____
R. Jess Brown

COMPLAINT

I. Plaintiffs are:

1. David Dennis, a Negro resident of the State of Mississippi;

2. Robert Moses, a Negro resident of the State of Mississippi;

3. Aaron Henry, a Negro resident of the State of Mississippi;

4. Hunter Morey, a white resident of the State of Mississippi, individually and as representatives of a class similarly situated, but so numerous as to make it impracticable to bring them all before this court.

II. Defendants are:

1. Paul B. Johnson, individually and as governor of the State of Mississippi;

2. Joe Patterson, individually and as attorney general of the State of Mississippi, (Sheriffs and DA's)

III. The jurisdiction of this court is invoked under:

a. the First, Fourth, Fifth, Thirteenth, Fourteenth and Fifteenth amendments, to the United States Constitution.

b. Title 28 U. S. Code 1343, 2281 et seq.

c. Title 42 U. S. Code 1971, 1981, 1983, 1985

Plaintiffs assert that Negroes in State of Mississippi have been deprived of their right to vote, of their right to equal educational opportunities and of equal protection of the laws and due process of law generally. These deprivation are a part of a system of oppression which deprives and for many years has deprived Negroes of their economic equality.

IV. Plaintiffs further assert that certain laws of the State of Mississippi, known as House Bills:

House Bills	Senate Bills
64 (Ex 1 hereto)	1515 (Ex 11 hereto)
246 (Ex 2 hereto)	1517 (Ex 12 hereto)
321 (Ex 3 hereto)	~~1525 (Ex 13 hereto)~~
322 (Ex 4 hereto)	~~1526 (Ex 14 hereto)~~ 1526
546 (Ex 5 hereto)	~~1531 (Ex 15 hereto)~~
777 (Ex 6 hereto)	1545 (Ex 16 hereto)
~~564 (Ex 7 hereto)~~	1783 (Ex 17 hereto)
~~881 (Ex 8 hereto)~~	~~1896 (Ex 18 hereto)~~
937 (Ex 9 hereto)	2016 (Ex 19 hereto)
960 (Ex 10 hereto)	~~2026 (Ex 20 hereto)~~
	2048 (Ex 21 hereto)

enacted into law and signed by defendant Johnson*, are

*These laws, having been passed in the 1964 Session of the Mississippi Legislature, have not yet been compiled into the Mississippi Code.

unconstitutional under the aforesaid amendments to the United States Constitution.

Plaintiffs further assert that the above laws have been passed as part of a concerted plan among the defendants, acting by and with the Mississippi legislature, to deprive the plaintiffs of their rights under the Constitution of the United States, under color of statute in the State of Mississippi, including but notlimited to the laws enumerated above.

Under the authority of Title 28 U. S. C. - 2281, plaintiffs request the appointment of a three-judge court to hear and determine the issues herein as they relate to the constitutionality of the aforesaid statutes.

V. Plaintiffs herein are acting individually and as members of a class similarly situated, but so numerous as to make it impractical to bring them all before this court, namely, persons white and Negro who are acting to obtain equal Civil Rights for Negroes in Mississippi, to enforce the rights of Negroes in the State of Mississippi to vote in national and party elections. There are common questions of law and fact affecting all members of the class, and a common relief is sought.

VI. All the defendants herein individually and in their official capacity and all members of the class which they represent together with the Mississippi Legislature, have acted in concert to deprive plaintiffs and the class of which they are members of their constitutional rights of freedom of speech and freedom of assembly to advocate equal Civil Rights for Negroes, and to teach effective legal methods of enforcing those rights, with the intent and effect of depriving Negroes of their Civil Rights including the rights to vote and to obtain equal educational and economic opportunities. There are common questions of law and fact affecting all members of the class of which defendants are members and a common relief against all is sought.

VII. Plaintiffs and the members of the class which they represent, have been ~~engaged~~ and are engaged in activities in Mississippi to improve educational opportunities for Negroes, to provide opportunities for Negroes to vote who are not now permitted to vote in Mississippi, to ameliorate the economic conditions of Negroes, and generally to provide due process of law and equal protection of the laws to Negroes who are deprived of these rights in Mississippi. The said activities include the following:

a. Establishment of schools, of which some are called Freedom schools, to afford education to Negroes in Mississippi who have heretofore been denied equal educational opportunities;

b. Organization of peaceful campaigns by Negroes in Mississippi to exercise their right to vote. Such campaigns have already been undertaken in the towns of Canton, Hattisburg, Greenwood, Ruleville and Clarksdale.

c. Establishment of community centers to explain methods of better educational enforcing the right to vote, the right to obtaining of enforcing due process of law, the right to equal protection of the laws, and other constitutional rights.

d. Organization of peaceful campaigns to protest the denial of such rights in Mississippi. The present suit involves a ~~genuine~~ genuine case or controversy because the laws put into effect in Mississippi affect the activities of plaintiffs already undertaken and to be undertaken in 1964.

VIII. The ranks of the class which the plaintiffs represent have been swelled by numerous young men and women who have volunteered to come to Mississippi to assist in the peaceful schools, campaigns and other programs outlined in paragraph ~~VI~~ of this complaint and peacefully to protest interference with those schools, campaigns and programs.

IX. The defendants, individually and in their official capacity, acting in concert with the Mississippi Legislature, ~~having~~ have caused to be enacted during the 1964 legislative session certain laws of the State of Mississippi designed to prevent plaintiffs and the members of the class which they represent from engaging inthe peaceful schools, campaigns and programs outlined in paragraph ~~VI~~ of this complaint, to intimidate and prevent persons from coming into Mississippi to assist in those school campaigns and programs and thereby to continue to deprive Negroes in Mississippi of their rights to vote, of equal protection of the laws, and of due process of law. In many cases, the repressive intent and effect of these laws passed in 1964 is evident from the text of the law alone, and in other cases such intent effect way easily be derived from a history of the laws, or its conjunction with other laws.

X. Some of the New laws passed in the 1964 session of the Mississippi legislature are designed to curtail the exercise of freedom of speech in protest against the denial of equal rights to Negroes in Mississippi, among these laws are:

a. House bills

HB 546 penalizes "picketing or mass demonstrations in and a manner as to obstruct or interfer with free ingress or egress to and from any public premises owned by the State of Mississippi". (Ex. B hereto)
This bill was introduced after demonstration in front of the courthouse in Greenwood, Mississippi to protest the failure of officials to permit Negroes to register to vote. When the bill was introduced in the Senate, according to the Jackson Daily News, April 3, 1964, Sen. E. K. Collins of Laurel said that the measure was "an emergency bill for Greenwood". (Ex. hereto)

HB 777 penalizes the failure or refusal of any person to comply with the order of an officer to move from a vehicle, refrain from lying down, refrain from obstructing a vehicle, from binding himself to another, ot to do any other act, when the failure or refusal is done with the intent or effect of breaching the peace. The Jackson Clarion-Ledger of April 28, 1964, reported that the bill was described in the house as an "emergency bill", and its purpose was said to be obvious from a reading of the bill. (Ex.)

(Ex 7 hereto)

b. Senate Bills

S.B.1545 penalizes printing or circulating any matter "wilfully and maliciously" so as to interfer with or prevent another from exercising a lawful trade or business. (Ex. hereto) This bill is plainly intended to prevent the lawful circulation of literature in protest against tradesman who discriminate against Negroes. SB.2043 revokes a provision of Section 6791.5 of the Mississippi Code ~~that~~ the commission on college accreditation and Junior college accreditation lists (Ex. hereto), At Tougaloo College, which has been a center of protest in Mississippi against segregation for many years, and promises to continue its role in the summer of 1964. Jackson Clarion-Ledger, April 9, 1964, (Ex. hereto) Originally an attempt was made in the Senate to revoke the charter of Tougaloo College (S. 1607, Ex. hereto), when that bill failed SB2043 was introduced, and Sen. Ben Hilbun Chairman of the Senate Universities and Colleges Committee, is reported to have said that the bill was aimed "at disaccrediting Tougaloo College". (Jackson Daily News, May 14 1964) (Ex. hereto), Tougaloo college, is on the Southern Association and Junior College accrediting lists.

XI. Some of the bills passed in the 1964 session of the Mississippi legislature have gone even further than the bills which curtail protest against deprivation of constitutional rights, and curtail other rights, privileges and immunities of Negro Citizens, including the right to vote and to move about freely, and the right to an impartial jury.

a. House Bills

H.B.64 empowers ~~manicipalities~~ municipalities to create quarantines and pest houses, and also to restrict the "movement of citizens". (Ex. hereto) This bill is plainly intended to permit ~~mimicipo~~lities to punish persons for voting or attending protest meetings.

H.B937 provides that jurors are to be chosen from "the registration book of voters", instead of from landowners as well as voters, as the law for formerly provided. Because most Negroes are prevented from voting in Mississippi, the intent of the law is clear, but Rep. McClellan spelled out the meaning, ~~as reported by UPI,~~ "persons of a particular color who own land out number the persons of the other color two to one in some counties". (UPI Report (Date) (Ex. Hereto)

b. Senate Bills

S.B 1515 provides that certain county courthouses may be closed on Saturdays (Ex. hereto). This bill is plainly intended to permit officials to close the courthouse on the day when Negroes who work during the week would be able to come to the courthouse and register to vote.

(LEGISLATIVE HISTORY)

§B 1783 provides that for Federal elections, for which voters need not pay a poll tax, voters must obtain a certificate from the tax collector marked "poll tax not paid". This law is clearly intended to circumvent the Twenty-Fourth Amendment to the United States Constitution, by continuing the connection between voting and poll tax at Federal elections, and to prevent Negroes from voting at local elections by separating federal and local elections for persons who have not paid a poll tax. (Ex. hereto)

XII. Some of the bills passed in the Mississippi legislature are intended to provide special penalities for plaintiffs and the members of the class which they represent, and to provide draconic law enforcement so as to prevent Negroes from voting and otherwise asserting their civil rights in Mississippi, and to prevent the plaintiffs from assisting in the assertion of those rights or from protesting the deprivation of those rights.

a. House Bills

HB. 246 provides for appointment of special deputy sheriffs "to cope with emergencies in matters of general law enforcement". (Ex. hereto) This law is plainly intended to provide for extra power in the sheriffs ~~office~~ to prevent demonstrations against denials of Civil Rights, and to prevent the assertion of those rights.

HB. 321, 322 provide for the construction and segregation of municipal prisons, and the transfer of prisoners from municipal and county prisons to the State penitentiary. (ex. hereto) When these bills were presented to the Senate, their Senate sponsor, Sen. John Powell reportedly said "This bill applies to those visitors who might be coming to our state this summer". (Jackson Daily News, May 8, 1964, Ex. hereto). This bill is plainly ~~aimed~~ intended to ~~at~~ intimidating persons who are protesting the denial of Civil rights to Negroes. The State Penitentiary at Parchman ~~xixxx~~ is notorious for its harsh treatment. At the same session of the legislature a law passed to reform (as it is called) the Penitentiary (HB. 227) provided in Section 48 that "no prisoner shall be placed in the 'dark hole' of the maximum security unit for a longer period than twenty four (24) hours", and corporal punishment was limited to seven licks or lashes." (Ex. hereto)

HB 564 provides in Section 5 for an increase in the Mississippi State Highway Patrol, and in Section 10, the law provides that the State Highway patrol ~~to interfer with~~ peaceful demonstrations. When recommending this ~~law~~ bill, defendant Johnson is reportedto have said "that the highway Patrol would be used" to insure that no Civil agitators are allowed to drive wedge of dissension between the people of the state." (Jackson Daily News April 21, 1964 Ex. hereto) See also Jackson Daily News, April 3, 1964, p. 1

upon the order of the governor, ... against other law enforcement agencies. This bill is intended to permit the highway patrol to prevent

¶ H.B. 960 removes from youth court jurisdiction minors under 21 years of age who are charged under the new breach of the peace statute (HB 777 Ex 7 hereto), or under the new anti-picketing statute (HB 546, Ex 5 hereto), as well as under other laws commonly used against civil rights workers (HB960 is Ex 10 hereto). This bill permits increased penalties and quicker court decisions against minor persons who attempt to obtain civil rights ~~per~~ for Negroes or to protest the denial of such rights. Rep. McClellan ~~Mxxxxxxxx~~ is reported to have said about HB 960 "... if we are to stop these thing from ~~xxxxxx~~ happening this summer, we have got to have this bill..." (UPI release, Ex hereto) See also Jackson Daily News, May 26, 1964 p. 6

b. Senate Bills

¶ S.B.1517 increases the maximum permissible penalties for violations of municipal ordinances from a fine of $100.00 or imprisonment for 30 ~~dayxx~~ days to a fine of $300.00 or imprisonment for 90 days. (Ex 12 hereto) ¶ This bill is intended to permit harsh penalties so as to discourage Negroes from attempting to enforce their rights and to intimidate persons who protest the denial of those rights.

¶ SB. 1526 authorizes fire ~~xxxxxxxx~~ departments to go outside city limits and permits municipal authorities to "enter into mutual assistance pacts

or agreements with other municipalities in the assignment of personnel, equipment, supplies and material for the purposes of combatting fires, natural and enemy disasters and the prevention of riots or civil disturbances of the peace and tranquility within such municipalities." (Ex. 18 hereto)

This bill is intended to authorize a particularly inhumane means of harassment, the use of firehoses, against Negroes who attempt to exercise their civil rights, and persons who protest the deprivation of those rights.

SB. 2016 provides that when a child is adjudged delinquent, his record may be made available to any Mississippi state agency, and upon a second similar adjudication his name is to be published in a newspaper. It further provides that no person who has a charge involving moral turpitude pending against him can be admitted to any institution of higher learning in Mississippi. (Ex. 19 hereto)

This law is intended to permit state officials to learn the names of Negroes who attempt to exercise their civil rights, or of persons who protest the deprivation of those rights, and to keep them from entering the University of Mississippi.

XIII. Certain bills were introduced in the Mississippi legislature in the 1964 session, which, while they failed to pass,

indicate the intention of the legislature to suppress the exercise of civil rights by Negroes and the activities of the plaintiffs in schools, campaigns and other programs to enforce the rights of Negroes in Mississippi and to protest the denial of those rights.

a. House Bills

HB786 proposed to punish any parent or teacher who "encourages, aids, abets, condones or otherwise permits a child" to violate the laws of Mississippi, in disobeying an officer, organized truancy from school, or picketing or parading (Ex hereto)

HB. 180 provided that the birth of a second illegitimate child was a felony with a penalty of one to three years in the penitentiary, and the birth of a third carried a penalty of three to five years. An amendment which passed the house, provided sterilization as an alternative penalty, but the Senate passed a milder, if still draconic bill, making the birth of a second child a misdemeanor only. As reported in the Delta Democrat-Times, Rep. Ben Owen said of this bill, which became law: finally passed

"...This is the only way I know to stop this black tide which threatens to engulf us...." (Delta Democrat-Times, May 21, 1964). See also Jackson Clarion-Ledger, March 12, 1964

A. HB. 870 would have prohibited any person or group from entering the state for the purpose of advocating the "willful violation of any of the laws of the state of Mississippi." This bill was intended to penalize persons who come into Mississippi to assist at schools, campaigns and other programs to afford civil rights to Negroes in Mississippi. (Ex hereto)

B. Senate Bills

SB. 1969 and 2136 were two bills to prevent the establishment of Freedom Schools and schools to teach voter registration in Mississippi. Both bills would have required a license from state officials in order to run a school in the state. (Ex hereto) See Jackson Daily News, 6/26/64, p.3

Plaintiffs assert that the above statutes and bills indicate an intention by officials of Mississippi to deny constitutional rights to the plaintiffs and the class which they represent by means of:

a. Denying the right to vote at local and federal elections;

b. Denying a fair and impartial jury;

c. Denying free movement of persons;

d. Denying the right to teach in schools;

e. Denying the right to protest the deprivation of rights, and

e. Intimidation from the exercise of rights by inhumane ~~and~~ harsh law enforcement.

XIV. Certain laws among those passed by the Mississippi legislature in the 1964 session are invalid on their face, and apart from any action in concert or pattern of suppression, because they are repugnant to the provisions of the United States Constitution. They are as follows:

a. House bills

1) HB. 64 which permits municipatlities to create quarantines and to restrict the movements of citizens "to enforce the general welfare....." This bill infringes the right freely to move about, one of the privileges and immunities of citizens, protected under the Fourteenth Amendment. (Ex) hereto)

2) HB. 566 which prohibits picketing or demonstrating so as to interfere with ingress to or egress from any public building. (Ex hereto) This law infringes the rights of freedom of speech and of assembly, and is too vague to afford an ascertainable standard of conduct.

3) HB. 777 penalizes failure of any person to comply with ~~the~~ an order of an officer to move from a vehicle, or to stand up, or to refrain from obstructing a vehicle, or to unbind himself from another, or to do any other thing. This law infringes

the freedom of speech and of assembly and is too vague to afford and ascertainable standard of conduct. (Ex 7 hereto)

4 HB. 937 provides that juries are to be chosen from the book of registered voters. This law deliberately deprives Negro ~~defendants~~ defendants and the plaintiffs herein of equal protection of the laws ~~under the Fourteenth Amendment to the Constitution~~ at all of trials under any of the laws of Mississippi. (Ex 9 hereto)

9 HB. 960 removes jurisdiction from the Youth Court for certain crimes committed by minors, chiefly crimes with which plaintiffs and other members of their class have been charged. (Ex. 10 hereto) This is a denial of equal protection of the laws under the Fourteenth Amendment to the Constitution.

B. Senate Bills

4 SB. 1545 penalizes "willfully and maliciously" printing anything to interfere with the trade or business of another (Ex 6 hereto). This law infringes freedom of the press and is too vague to afford and ascertainable standard of conduct.

4 SB. 1783. Provides that those who do not pay a poll tax must obtain a receipt reading "poll tax not paid," in order to vote at Federal elections. (Ex 7 hereto) This

law violates the ~~XXXXXXXX~~ Fifteenth and Twenty-fourth Amendments to the Constitution by abridging the right to vote on grounds of color, and by tying federal elections to the poll tax.

XV. Plaintiffs assert that, unless the defendants are enjoined from putting the laws involved herein into effect, and the members of the class they represent, ~~plaintiffs,~~ ~~they~~ will be deprived of their constitutional rights to vote, to move about freely, to equal protection of the laws and to due process of law. Members of the class which plaintiff represent have been* and will be arrested, incarcerated, tried and convicted as a result of the concerted action of the defendants to deprive them of their constitutional rights. Moreover, the threat of the denial of constitutional rights and of brutal and draconic law enforcement intimidates other members of the class which plaintiffs represent from exercising those rights.

Wherefore, plaintiffs pray that the following relief be granted:

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* See Lupton v. Hattiesburg, 5 Cir. Dkt. No. 21441, June 5, 1964, which involved a petition for removal of a case under H.B. 546 (picketing a public building). Ex hereto.

XVI. That a three-judge court be convened as provided in Title 28USC §2281 and 2284 to declare certain laws of the State of Mississippi upon the ground that they are unconstitutional, as follows:

House Bills	Senate Bills
64 (ex 1 hereto)	1515 (ex 11 hereto)
246 (ex 2 hereto)	1517 (ex 12 hereto)
321 (ex 3 hereto)	1525 (ex 13 hereto)
322 (ex 4 hereto)	1526 (ex 14 hereto)
546 (ex 5 hereto)	1531 (ex 15 hereto)
777 (ex 7 hereto)	1545 (ex 16) hereto)
564 (ex 8 hereto)	1783 (ex 17 hereto)
881 (ex 8 hereto)	1896 (ex 18 hereto)
937 (ex 9 hereto)	2016 (ex 19 hereto)
960 (ex 10 hereto)	2026 (ex 20 hereto)
	2043 (Ex 21 hereto)

XVII. That the defendants be permanently engoined from putting any of the said laws into effect, from making arrests, having trials, or incarcerating persons by means of the said laws, and from taking any other action under the said laws.

XVIII. That such relief be granted preliminarily pending a trial of the issues, so that plaintiffs and the members of the class they represent will not suffer irreparable injury due to arrests, incarceration, trials and intimidation under the above names statutes.

XIX. That a temporary restraining order be issued pending the hearing on the preliminary injunction, so that plaintiffs

and the class they represent will not suffer irreparable injury due to arrests, incorcertation, trials and intimidation under the above-named statues.

XX. That plaintiffs be granted such further relief as to the court may seem just and proper.

1/4/65
Peter Dorsen

✓HLW
✓Carpenter
✓Marshall

✓Pomerantz
✓Rachlin
✓Marcuse

QUESTIONS FOR DECISION - DENNIS V. JOHNSON

Jess Brown 601-35-3-Y206

I POLICY QUESTIONS:

A. Shall we attempt to enjoin pending prosecution under all of the statutes involved?

B. We expect to bring in several other laws passed at the 1964 session, which are pretty clearly open to challenge. Shall we include the School Bill?

C. We will wish to prove certain patterns of arrest and prosecutions under these laws. In how many towns, and in what depth shall we use discovery proceedings? D. Is it worth considering challenging the validity of these laws as resulting from a legislature which was elected contrary to the laws of the United States and perhaps of the State of Mississippi?

II PRACTICAL QUESTIONS:

A. Can we find a plaintiff to join who has been directly affected by each of the statutes involved? If so, who?

B. What specific additional law enforcement officials shall we serve as defendants? THis will depend partly on I A above.

C. To prove the legislative intent, what Mississippi reporters can we use?

D. What New York or other out-ofstate reportor or observer of the legislative session can we use?

E. What official information can we obtain that can be helpful in terms of legislative records, statics of arrest by statutes, statics of arrest by color, statics of arrest by individuals, FBI saatics, judicial statics.

F. What available printed information that will be helpful on the legislative intent can we get from the White Citizens Co ncil? State Sovereignty Commission? Other private organizations?

G. What sepcific towns or counties shall we use for specific investigation.

H. What expert testimony can we use to show the general background of this legislation? To show the obvious effects of certain

laws if routinely enforced? To show the likely and intended discriminatory enforcement of certain of these laws? To show the lack of any other legitimate legilsative purpose.

I. What other lawsuits are pending or have been decided that involved the validity of any of these statutes or the manner of their enforcement.

ANTI-PICKETING LAW PASSED IN MISSISSIPPI TO COMBAT CIVIL RIGHTS ACTIVITIE

On April 8, 1964, Gov. Paul E. Johnson of Mississippi signed into effect House Bill No. 546, An Act to Prohibit the Unlawful Picketing of State Buildings, Courthouses, Public Streets, and Sidewalks. This bill was rushed through the legislature in less than one month in reaction to civil rights activities in the Mississippi towns of Hattiesburg and Greer wood. In those two cities, Negroes recently held Freedom Days in which picket lines were set up at County Courthouses to protest the refusal of local officials to register Negroes to vote on an equal basis with whites. The situation in both counties is serious. The Registrar in Hattiesburg (Forrest County) is under Federal Indictment for refusing to register Negroes. Nonetheless, city, county and state officials combined to limit the ability of Negroes to protest their disenfranchisemen On April 9, the day after Gov. Johnson signed the new law into effect, 52 people were arrested for picketing in Greenwood. The next day, 55 were arrested in Hattiesburg. Among those arrested in Hattiesburg was Rev. John E. Cameron, a Negro minister from Hattiesburg who is running against Rep. William Colmer in the Democratic Primary on June 2nd for the 5th Congressional District Seat. Presented below are, first, the text of the anti-picketing law itself, and then a detailed account of the events in Hattiesburg and Greenwood.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. It shall be unlawful for any person, singly or in concert with others, to engage in picketing or mass demonstration in such a manner as to obstruct or interfere with free ingress or egress to and from any public premises, State property, county or municipal courthouse city halls, office buildings, jails, or other public buildings or prop-

erty owned by the State of Mississippi or any county or municipal goverr ment located therein or with the transaction of public business or admir istration of justice therein or thereon conducted or so as to obstruct c interfere with free use of public streets, sidewalks or other public ways adjacent or contiguous thereto.

SECTION 2. Any person guilty of violating this act shall be deeme guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than Five Hundred Dollars ($500.00), or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.

SECTION 3. This act shall take effect and be in force from and after its passage.

HATTIESBURG AND GREENWOOD. On Freedom Day, January 22, Negroes in Hattiesburg were successful for the first time in establishing a picket line at the Forrest County Courthouse. They carried signs protesting the failure of Forrest County officials to allow Negroes to register to vote. On March 25, Negroes in Greenwood followed suit. They also held a Freedom Day and were able to set up a picket line at the Leflore Count Courthouse. In both cases success was due in large part to the presence of white ministers from the North who joined the picket line. Local officials were apparently unwilling to risk the adverse national publicity that might result from arresting the ministers together with large numbers of local citizens.

From the beginning, however, there were attempts by Greenwood and Hatti burg officials to limit the extent of picketing. In Hattiesburg,

demonstrators were told after a few days that they would be allowed to picket only in a barricaded area on one part of the sidewalk in front of the courthouse. In Greenwood, the same pattern was followed. Picketing was allowed for four days all the way around the courthouse. But on the afternoon of March 30, the picketers were advised that they would have to confine picketing to the west side of the courthouse starting March 31 because "white people in the community had told police that they were afraid to come to the courthouse while the pickets were there. The Greenwood leaders felt that the west side of the courthouse, facing a residential district, was not prominent enough to allow effective presentation of their demands. When they refused to limit picketing to the west side on the morning of the 31st, fourteen demonstrators were arrest and charged with Disorderly Conduct. Their bond was set at $500 apiece. Picketing was suspended, but a new Freedom Day was scheduled for April 9

Meanwhile, state officials were already at work to ensure that even limited picketing rights would be abolished. Rep. Jones of Forrest County introduced House Bill 546, the purpose of which according to the Jackson Clarion-Ledger was "to make it illegal to picket public buildings in Mississippi." The bill passed the House unanimously. When the bill reached the Senate, Sen. E.K. Collins of Laurel told his colleagues the measure was "an emergency bill for Greenwood." According to the Jackson Daily News (April 2, 1964) after Sen. Collins' remark, "there was no further discussion of the measure, which was designed to outlaw activities by civil rights groups." The bill was passed unanimously in the Senate. On the evening of April 8, the night before the second Greenwood Freedom Day, Gov. Johnson signed the bill into law.

As already noted, 52 pickets were arrested the next morning in Greenwood Those demonstrating were first asked to move to the West side of the Courthouse. They complied with this request. But they were then told that only ten local Greenwood residents would be allowed to picket. Refusing to accept this further limitation, the picketers were all arreste Among those arrested were two local Negro ministers and eight white ministers from Pennsylvania and Ohio. Also arrested were five school children aged 9, 10, 11, 11, and 13. They were taken to the Police Station and later released to their parents. As the children were released, police told the parents that if the children picketed again, the parents would be arrested and the children sent to Reform School. The picketers were charged with Unlawful Picketing and Refusing to Obey an Officer. Charges were dropped later in the day, and all 47 adult demonstrators were released.

Also on April 9, in Hattiesburg, the picket line was stopped at 4:30 p.m by police. A deputy sheriff read the new anti-picketing law to the demonstrators and told them that if they did not disperse they would be arrested. As there were few picketers on the line, they chose not to make a stand at that time and dispersed. When picketing resumed at 9:45 the next morning, 37 demonstrators were arrested immediately. They were not informed as to the reason for their arrest and as of evening no charges had been preferred. During the day, the number of those who attempted to picket and were arrested rose to 55. Among those arrested were seven white ministers from Pennsylvania, Connecticut, and Colorado. As mentioned above, Rev. John E. Cameron, Negro candidate for Congress in the 5th Congressional District, was also arrested.

FACSIMILE

MISSISSIPPI LEGISLATURE REGULAR SESSION 1964

BY: SENATORS COLLINS AND HILBUN TO: JUDICIARY

SENATE BILL NO. 2027

AN ACT TO DEFINE CRIMINAL SYNDICALISM; TO MAKE UNLAWFUL THE ACT OF CRIMINAL SYNDICALISM; TO PROHIBIT ASSEMBLAGE FOR THE PURPOSE OF CRIMINAL SYNDICALISM; TO PROVIDE THE PENALTY THEREFOR; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Criminal syndicalism as used in this Act is hereby defined to be the doctrine or precept which advocates, teaches or aids and abets the commission of crime, sabotage (which word is hereby defined as meaning wilfull and malicious physical damages or injury to physical property), unlawful acts of violence and force, arson or other unlawful acts or methods of terrorism as a means of accoplishing or effecting a change in agricultural or industrial ownership or control or in effecting any political or social change or for profit.

SECTION 2. Any person who:

(1) By word of mouth or written words or personal conduct advocates, instigates, suggests, teaches or aids and abets criminal syndicalism or the duty, necessity, propriety or expediency of committing crime, criminal syndicalism, sabotage, violence or any other unlawful method of terrorism as a means of accomplishing or effecting a change in agricultural or industrial ownership or control or effecting any political or social change or for profit; or

(2) Openly, wilfully and deliberately by spoken or written words justifies, or attempts to justify, criminal syndicalism or the commission or the attempt to commit crime, sabotage, violence or other unlawful methods of terrorism with intent to exemplify, approve, spread, advocate, instigate, teach, aid, suggest or further the doctrine of criminal syndicalism; or

(3) Prints, publishes, edits, issues, circulates, sells, distributes or publicly displays any book, paper, pamphlet, document, poster, handbill or written or printed matter in any form whatsoever containing, advocating, instigating, advising, suggesting, aiding and abetting or teaching criminal syndicalism; or

(4) Organizes or helps to organize or knowingly becomes a member of or voluntarily assembles with any society, organization, group or assemblage of persons organized, formed or assembled to advocate, teach, aid, and abet criminal syndicalism; or

(5) Wilfully, by personal act or conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism with intent to accomplish a change in agricultural or industrial ownership or control, or effecting any social or political change or for profit; is guilty of a felony, and upon conviction thereof shall be punished by a fine of not less than Two Hundred Dollars ($200.00) nor more than One Thousand Dollars ($1,000.00), or by imprisonment in the state penitentiary for a term of not less than one year nor more than ten years, or by both such fine and imprisonment.

SECTION 3. Whenever two or more persons assemble or consort for the purpose of advocating, encouraging, teaching or suggesting the doctrine of criminal syndicalism as defined in this Act, such assemblage is unlawful, and every person voluntarily participating therein by his presence, aid or instigation is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state penitentiary for a term of not less than one year nor more than ten years, or by a fine of not less than Two Hundred Dollars ($200.00), nor more than One Thousand Dollars ($1,000.00), or by both such imprisonment and fine.

SECTION 4. The owner, lessee, agent, superintendent, janitor, caretaker or other person in charge, or occupant of any place, building, room or rooms or structure who knowingly permits therein any assembly or consort of persons prohibited by the provisions of Section 3 of this Act or who, after notification by authorized public or peace officer that the place or premises, or any part thereof, is so used, permits such use to be continued is guilty of a misdemeanor and punishable by imprisonment in the county jail for not less than sixty days nor more than one year, or by a fine of not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00), or by both such imprisonment and fine.

SECTION 5. The provisions of this Act are severable. If any section, subsection, paragraph, sentence or clause of this Act is for any reason held to be invalid, the remainder of this Act shall remain valid and enforceable.

SECTION 6. That this Act shall take effect and be in force from and after its passage.

FACSIMILE

MISSISSIPPI LEGISLATURE
By: Jr. Jones (Forrest)

REGULAR SESSION 1964
To: Judiciary "A"

HOUSE BILL NO. 870

AN ACT TO PROHIBIT ENTRY INTO THE STATE FOR THE PURPOSE OF COMMITTING ACTS IN WILFULL VIOLATION OF THE LAWS OF THIS STATE; ALLOWING INJUNCTION TO ISSUE; AND PROVIDING PENALTY FOR VIOLATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. It shall be unlawful for any person, group, or organization to advocate or have as its purpose, aim or objective, any change by force, violence, or wilfull violation of any of the laws of the State of Mississippi; or any of its governmental subdivisions.

SECTION 2. Any court of competent jurisdiction may issue an injunction to prevent any such person, group, or organization from entering this State with the purpose of violating the provisions of this act.

SECTION 3. Nothing herein shall be construed to limit or prohibit the advocacy of any change, by peaceful or lawful means, in any law or laws of the State of Mississippi.

SECTION 4. Anyone found guilty of violating this act, upon conviction, shall be guilty of a felony, punishable by a fine of not more than One Thousand Dollars ($1,000.00), or by confinement in the penitentiary not more than two (2) years, or by both such fine and imprisonment.

SECTION 5. This act shall take effect and be in force from and after its passage.

I.

THE COMPLAINT IS NOT BASED ON A THEORY OF CONSPIRACY, AND IN ANY EVENT THE COMPLAINT SUFFICIENTLY STATES A CLAIM ON WHICH RELIEF CAN BE GRANTED.

The defendants state, on page two of their brief, that "the Complaint in this cause is based entirely on a charge of conspiracy." This is totally incorrect. The Complaint does indeed allege the existence of a conspiracy, but it does so as part of the broad description of those facts which show the intent, purpose, and necessary effect of the legislation which the Complaint challenges. It may well be that the existence of the conspiracy alleged might in a separate law suit also constitute grounds for a cause of action under 42 U.S. C. 1985, which specifically permits an action for the recovery of damages against the conspirators; such relief is specifically not requested here.

The citations provided by the defendants in their brief on the conspiracy question are thus of little relevance to the present case. Dunn v. Gazzola, 216 F. 2nd 709, involved an allegation, as a minor part of a complicated complaint, of a violation of Section 1985 (3), which the court felt was "purely formal," (at page 711), and it held the allegation of violation of the statute without any support in the subordinate facts alleged. In the present case, the conspiracy is itself one of a number of subordinate facts alleged to support a much broader cause of action. McCampbell v. Warrick Corporation, 109 F2nd 115, cited by the defendants, was an action in equity to set aside a foreclosure decree entered more than forty years before the date of the action. Fraud was alleged in obtaining the decree, and the court held that insufficient subordinate facts were alleged to sustain the conclusion that fraud existed. Parmerlee Transportation Company v. Keeskin, 186 F.Supp. 533, affirmed 292 F.2nd 794, certiorari denied, 7 L.Ed. 2nd 340, was a Sherman Act anti-trust case, in which the court simply held that the subordinate facts alleged did not offer support for the conclusions of violation of the anti-trust laws also alleged. Morse v. Lewis, 54 F.2nd 1027, was an action to set aside an arbitrators' award of land to one of the parties, in which it was alleged that the defendants had concealed from the arbitrators certain published court decisions; the court simply held that there had to be some more detailed allegation to justify the contention that such a decision could be "concealed" in such a way as to constitute fraud. These are all of the cases cited by the defendants; they all involve cases based on fraud or conspiracy, unlike the present case, where the conspiracy is itself merely a subordinate fact constituting one part of a much broader set of allegations.

The actual standards by which the particularity of the allegations of the Complaint must be judged are not at all these, drawn from entirely unrelated cases in entirely different contexts, but rather the clear standards set forth by the Federal Rules of Civil Procedure. Federal Rule 8 A(2) provides simply that the Complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A proposal, presented to the Judicial Conference of the United States suggesting the addition of the phrase "which statement shall contain the facts constituting the cause of action," was specifically rejected by the Judicial Conference and excluded from the Federal Rules. (see 2 Moore's Federal Practice 1692.)

> There is no requirement that the pleading state 'facts' or 'ultimate facts' or 'facts sufficient to constitute a cause of action' . . . . the courts have recognized that the function of pleadings under the Federal rules is to give fair notice of the claim asserted so as to enable the adverse party to answer and prepare for trial, to allow the application of the doctrine of judicata, and to show the type of case brought, so that it may be assigned to the proper form of trial. 2 Moore's Federal Practice 1694, 1695 (see the many cases cited at 2 Moore's Federal Practice Sections 8.12, 8.13) 1683 - 1713).

As Judge Hoffman states in United States v. American Linen Supply Company, 141 F. Supp. 105 at 110, "the accepted test appears to be whether the plaintiff would be entitled to recover upon any state of facts which might be proved in support of the allegations." (see also Des Isles v. Evans, 200 F.2nd 614, and Ho Hoshman v. Esso Standard Oil Company 263 F. 2nd 499.

The provisions of Rule 9(b) of the Federal Rules of Civil Procedure, referred to in the defendant's brief, refer only to fraud, mistake and condition of mind. Even here, the rules themselves indicate that "malice, intent, knowledge and other condition of mind of a person may be averred generally;" and rule 9(b) must be read in the light of rule 8(a) referred to above; see United States v. Dittrich, 7 F.R. Serv 9(d).1 case 4; Shultz v. Manufactures and Trust Company 1 F.R.D. 53, and 2 Moore's Federal Practice 1908.

THE PLAINTIFFS ADEQUATELY REPRESENT THE CLASS ON WHOSE BEHALF IN PART THIS ACTION IS BROUGHT, AND IN ANY EVENT THEIR FAILURE TO DO SO CANNOT PROVIDE A BASIS FOR DISMISSING THIS ACTION

On a Motion to Dismiss, the allegations of the Complaint must be assumed to be true. Certainly the Complaint amply alleges the unconstitutional deprivation of rights occasioned both to these specific plaintiffs and to the class they represent by the passage and/or enforcement of the statutes in question. Paragraph thirteen of the Complaint alleges that the plaintiffs are members of a class engaged in certain constitutionally protected activities; paragraph fourteen alleges the intent of the defendants to intimidate and coerce the plaintiffs and the class of which they are a part from pursuing these activities and alleges the passage of the statutes in question as a part of that effort. Paragraph fifteen, in the first count, alleges the unconstitutionality of each of the statutes because of its enactment as a part of the conspiracy, which paragraph further alleges was against the plaintiffs and the class of which they are a part; the second count alleges the unconstitutionality of the statutes because of their purpose of defeating the efforts of the plaintiffs and the class of which they are a part; the fourth count alleges the unconstitutionality of the statutes because of the manner of their enforcement against the plaintiffs and the class of which they are a part. Paragraph sixteen alleges that the laws affect the activities of the plaintiffs and the class which they represent, and paragraph eighteen alleges the unconstitutional deprivation of rights of the plaintiffs and the class they represent. All of these allegations must be taken as true for the purposes of a motion to dismiss; they certainly contain ample allegations that the plaintiffs are parts of the class they state they represent, and that the cause of action is common to all of them.

In any event, the extent to which the particular named plaintiffs represent the class of which they purpote to be members is a question of fact that can only be determined properly after a trial on the merits. The cases are unanimous in so holding. Bailey v. Patterson, 206, F. Supp. 67, upon which the defendants rely heavily in their brief, states:

> "In the amended complaint, plaintiffs purported to represent 'Negro citizens and residents of the State of Mississippi and other States.' Plaintiffs right to represent anyone

See First sentence Pg 6

by the pleadings . . . Whether this is a proper class action involves a question of fact. Flaherty v. McDonald, 178 F.Supp. 544. In Clark v. Thompson, 206 F. Supp. 539, also cited by the defendants, the finding is similarly made as a fact that the plaintiffs do not represent a class; the allegations of the complaint were however sufficient to bring the matter to trial, and whether this case should be dismissed without a trial is the only issue before this Court at this time. See also Evers v. Dwyer, 358 U.S. 202, 79 S. Ct. 178, 3 L.Ed 2nd 222.

Under the allegations of the present Complaint, the plaintiff may bring in evidence indicating either threatened enforcement or actual enforcement of the statutes attacked against the individual plaintiffs, and they can introduce evidence of infringement of their rights through the mere passage and existence of these statutes; in either event, they will be representative members of the class thus affected. For purposes of a Motion to Dismiss for failure to state a cause of action, if facts sufficient to show the existence of a cause of action may be introduced under the allegations of the Complaint, the Complaint is sufficient; see cases cited on page 2 above.

Going even further, even if the defendants' argument concerning the propriety of this action as a class action were correct, it would be open to further fatal objection. Failure to shwo that the plaintiffs represent others, or members of a class including others, would not lead to dismissal of the present action. It might seriously modify the relief granted; it might seriously limit the issues with which the court would be concerned; and it might restrict the number of persons who might take immediate advantage of the results of the Court's decision. It does now, however, preclude the existence of a cause of action or the granting of relief. In the very cases the defendants rely on so heavily, Bailey v. Patterson, supra, and Clark v. Thompson, supra, although the court concluded on the facts after trial that the plaintiffs did not properly represent the class they alleged they represented, the decisions was not for the defendants; the cases were not dismissed, but rather a declaratory judgment was entered and jurisdiction was retained for further proceedings. This was so in each case, as it would be in this case if the defendants' challenge to the propriety of the class action was sustained, because the plaintiffs have an individual right to relief as much as the class they purport to represent has a right to relief, and that individual right constitutes a valid cause of action on which releif can be granted in the present proceedings.

but themselves was put in issue," see p. 5

Thus, under the allegations of the present complaint, which must be taken as true for purposes of a Motion to Dismiss, the plaintiffs appear sufficiently to represent the class for which they purport to act; whether they do or not is in any event a factual question which cannot be reached on a Motion to Dismiss; and even were the plaintiffs found not to represent this class, the present action could still not be dismissed, for a valid cause of action and a valid basis for relief remain.

For all of the foregoing reasons, it is respectfully submitted that the defendants Motion to Dismiss should be denied.

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

DAVID DENNIS, ET AL — PLAINTIFFS

VS.

CIVIL ACTION
NO. 3618

PAUL B. JOHNSON, ET AL — DEFENDANTS

BRIEF IN OPPOSITION TO MOTION TO DISMISS

The defendant's Motion to Dismiss contains two distinct arguments: first, that the complaint is based entirely on the existence of a conspiracy, and insufficient facts are alleged to sustain a finding of the existence of such a conspiracy; and second, that the complaint is brought as a class action and the individual plaintiffs are not proper representatives of the class whom they purport to sue. It is respectfully submitted that both of these arguments rely on a fallacious reading of the theory underlying the plaintiffs' complaint, and that in any event neither argument is sufficient to justify the granting of the Motion to Dismiss.

Respectfully submitted

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

DAVID DENNIS, ET AL,	PLAINTIFFS
VS.	CIVIL ACTION NO. 3618
PAUL B. JOHNSON, ET AL	DEFENDANTS

BRIEF IN SUPPORT OF MOTION TO DISMISS

In considering the Motion to Dismiss, the Court should remember that the Defendants in this case are Paul B. Johnson, Governor, Carroll Gartin, Lieutenant Governor, Joe T. Patterson, Attorney General, T. B. Birdsong, Commissioner of Public Safety, John Doe, Richard Roe and Jane Doe, being fictitious names purported to be a class constituting the appointed and elective legislators and officials of the State of Mississippi and its political subdivisions responsible for the enactment, execution and enforcement of the laws, regulations, procedures and customs of the State of Mississippi and its political subdivisions, including members of the Legislature, heads of executive departments, sheriffs, deputy sheriffs and police chiefs, officials responsible for the public educational system of the State, members of the State Judiciary, prosecuting officials and officials in charge of the prisons and jails of the State and its subdivisions. The only Defendants upon whom process has been

served and who are now before the Court are Paul B. Johnson, Governor, Carroll Gartin, Lieutenant Governor, Joe T. Patterson, Attorney General and T. B. Birdsong, Commissioner of Public Safety. This Brief is filed on behalf of the last four named Defendants, only.

The Complaint in this cause is based entirely on a charge of conspiracy. The charges against these Defendants begin in Paragraph 11 wherein it is alleged that the Defendants and their predecessors in office have been engaged and continue to be engaged in a conspiracy and a concerted and combined effort to nullify, etc. (Underscoring ours) The second sentence in this Paragraph alleges that in seeking to achieve these ends, and in furtherance of said conspiracy (underscoring ours), the Defendants have engaged in innumerable acts which are set out in subparagraphs (a) through (o). Paragraph 14 then charges that in furtherance of the conspiracy, the Defendants have enacted and caused to be enacted certain State Statutes.

The Court will note that the allegations in sub-paragraphs (a) through (o) of Paragraph 11 are all couched in general assertions and are but conclusionary allegations. Further that they complain of a violation of certain rights, not of the Plaintiffs themselves, but of the purported class whom they claim to represent.

A charge of conspiracy, as all of the Courts have held, like a charge of fraud, must be pled with that particularity controlled by Rule 9b of the Federal Rules of Civil Procedure. It cannot be pled by conclusionary allegations or by the general assertion that Defendants conspired

for the purpose of depriving Plaintiffs of equal protection of the laws or the rights and privileges and immunities secured by the Constitution and Laws of the United States.

In the case of Dunn v. Gazzola, 216 F.2d 709, an action was brought for damages under two provisions of the Civil Rights Act, 42 U.S.C.A. 1983 and 1985(3). This suit was brought against a group of officials of the Commonwealth of Massachusetts and the City of Attleboro. This was a conspiracy case. The complaint was dismissed for failure of Plaintiff to state a claim upon which relief could be granted. The First Circuit, in sustaining the action of the District Court, used the following language:

> "* * * the bare conclusionary allegation that 'the defendants jointly conspired for the purpose of depriving the plaintiff of the equal protection of the laws and of her rights and privileges and immunities secured to the plaintiff by the Constitution and laws of the United States', without any support in the facts alleged, could not protect the complaint from the motion to dismiss; only material facts and not the unsupported conclusions of the pleader are considered in the light most favorable to the plaintiff."

To the same effect are the cases of McCampbell v. Warrick Corp., 109 F. 2d 115, Cert. Denied, 84 L.Ed. 1401, Parmelee Transp. Co. v. Keeskin, 186 F. Supp 533, Aff'd. 292 F. 2d 794, Cert. Denied, 7 L.Ed. 2d 340.

In C.J.S., under the general heading "Conspiracy", Section 25, at page 1039, we find this statement, "the facts and circumstances which constitute the conspiracy, or from which it might be inferred, should be set out clearly, concisely and with sufficient particularity", citing Morse v. Lewis, 54 F.2d 1027, Cert. Denied, 286 U.S. 557, 76 L.Ed. 1291.

PLAINTIFFS CANNOT REPRESENT A CLASS OF WHICH THEY ARE NOT A PART

There is no charge in the Complaint that any of the statutes which are sought to be held unconstitutional have been enforced against Plaintiffs or that they or any of them are threatened with the enforcement of any one of the statutes. In the Fourth Count of Paragraph 15 we find the general allegation that each of said statutes have been and continues to be enforced against the Plaintiffs herein and the classes which they represent in an unconstitutional manner. There is no specific allegation which clarifies this statement which appears to be merely a conclusion of the pleader. This being a charge of conspiracy, Plaintiffs are required to set out with more particularity than has been set out, such a charge in order to envoke the jurisdiction of this Court. There is no allegation that any municipality has created quarantines as is authorized by H. B. 64. There is no allegation that any one of the Plaintiffs has come within the provisions of H. B. 227. There is no allegation that any municipal prison has been constructed under H. B. 321-322. There is no allegation that any one of the Plaintiffs has been prohibited from peaceful picketing or demonstrating. There is no allegation that any one of the Plaintiffs has been penalized or threatened with penalties under H. B. 777. There is no allegation that any one of the Plaintiffs has been denied the right to sit on a jury or tried before a jury affected by H. B. 937. Certainly no one of the Plaintiffs is affected by H. B. 960. They are presumed to be adults, not minors. There is no allegation

that any one of the Plaintiffs has been denied the right to register because any County Courthouse was closed on Saturday as is authorized by S.B. 1515. There is no allegation that any one of the Plaintiffs has been subjected to any penalty for violation of a municipal ordinance, the punishment for which is provided by S.B. 1517. There is no charge that any one of the Plaintiffs has been denied any constitutional right by virtue of S.B. 1526. There is no charge that any one of the Plaintiffs has been prosecuted or threatened with prosecution under S.B. 1545. S.B. 1783 has been declared to be unconstitutional by a Three-Judge Court in this District. There is no charge that any one of the Plaintiffs has been denied any right under S.B. 2016. There is no charge that any one of the Plaintiffs is, in any way, connected with Tougaloo College or has been denied any right by virtue of the accreditation of any college in Mississippi.

The right of Plaintiffs to bring a class action seeking to declare invalid a state statute, in the absence of any showing that the individual plaintiffs have been, are being or are threatened with prosecution under those statutes, has been well settled in the case of Bailey v. Patterson, reported in 199 F.Supp. 595 and 206 F.Supp. 67. See also Bailey v. Patterson, 82 S.Ct. 549, 369 U.S. 31, 7 L.Ed. 2d 512.

In the case of Clark v. Thompson, 206 F.Supp. 539, affirmed C.C.A. 5th Cir. 313 F.2d 637, the Court used the following language:

> "A desire for a sweeping injunction cannot relieve plaintiffs of the obligation to

comply with the general rule that they must present facts sufficient to show that their individual needs require injunctive relief." Citing Bailey v. Patterson, supra; McCabe vs. Atchison T. & S.F. Ry. Co. 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169; Brown v. Board of Trustees, U.S.C.A. 5th, 187 F.2d 20; and Kansas City, Mo.,Et Al vs. Williams, Et Al, U.S.C.A. 8th Cir., 205 F.2d 47.

In the case of Poe vs. Ullman, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed. 2d 989, the Supreme Court of the United States went into great detail in discussing the duty of the courts in regard to entertaining questions of the constitutionality of state statutes. We find in the Opinion of Mr. Justice Frankfurter on Pages 996 and 997 of 6 L.Ed. 2d this very pertinent language:

"The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity. The various doctrines of 'standing', 'ripeness' and 'mootness', which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations each having its own 'varied application' of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance' of one who is himself immediately harmed, or immediately threatened with harm, (underscoring ours) by the challenged action." * * *

"The party who invokes the power to annul legislation on grounds of its unconstitutionality must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement". (Underscoring Ours)

There is no allegation in the Complaint here that any one of the Plaintiffs has sustained or is immediately in danger of sustaining any direct injury as the result of the enforcement of any of the statutes here sought to be stricken down.

Plaintiffs plant their entire cause of action on a conspiracy. They make no charge that any particular statute has been or is being enforced against them. As the Supreme Court said in the case of Communist Party of the United States vs. Subversive Activities Control Board, 367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed. 2d 625, at Page 674 of 6 L.Ed. 2d,

> "Merely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated. Even where some of the provisions of a comprehensive legislative enactment are ripe for adjudication, portions of the enactment not immediately involved are not thereby thrown open for a judicial determination of constitutionality. 'Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case."

We earnestly submit that, in the present posture of the Complaint in this cause the Motion to Dismiss For Failure to State a Claim should be sustained.

Respectfully Submitted.

JOE T. PATTERSON, ATTORNEY GENERAL
OF THE STATE OF MISSISSIPPI

WILL S. WELLS, ASSISTANT ATTORNEY
GENERAL OF THE STATE OF MISSISSIPPI

BY: Will S. Wells
WILL S. WELLS, OF COUNSEL FOR
ABOVE NAMED DEFENDANTS

Draft ... 10/29/64 Recd 11/4/64

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
- - - - - - - - - - - - - - - - - - - -x

No. _____

AFFIDAVIT OF DISQUALIFICATION
OF HON. HAROLD COX

- - - - - - - - - - - - - - - - - - -x

STATE OF MISSISSIPPI)
COUNTY OF HINDS) ss.:

, being duly sworn, deposes and says:

1. ~~He is~~ I am one of the plaintiffs in the above-entitled action.

2. I belive and aver that the judge before whom this action is now pending, Hon. Harold Cox, has a personal bais and prejudice against myself and my co-plaintiffs, and the class we represent.

3. The facts and reason for the belief that such personal bias and prejudice exist are as follows:

The named plaintiffs are officers or members of the Council of Federated Organizations, an association of

the Students Nonviolent Coordinating Committee, the Congress of Racial Equality, the National Association for the Advancement of Colored People, and the Southern Christian Leadership Conference. The sole purpose of ~~each of~~ these organizations, singly and jointly, is to eradicate racial discrimination in the United States. The sole purpose of the Council of Federated Organizations (COFO) is to eradicate racial discrimination within the State of Mississippi. In pursuit of that goal, COFO is actively engaged in promoting participation by all citizens of Mississippi, both Negro and white, in the total political life of the State. The principal means that are employed to achieve this goal are education and voter registration.

It is a notorious fact, ~~a~~ of which this court may take judicial notice, that the huge majority of Negro citizens of Mississippi are excluded by law and custom from any participation in the State's political processes. The principal means of exclusion is by the flagrant denial of the franchise to Negroes

throughout the State. To defeat these illegal practices, COFO sustains a continuous program designed to augment registration of Negro voters. Correlatively, it engages in educational programs throughout ~~the~~ the State in order to supplement the inferior educational opportunities which the State provides its Negro citizens, and for the additional purpose of ~~information~~ informing the Negro population of their rights and responsibilities as citizens.

The activities conducted by COFO are resisted at every step by the white officials of the State of Mississippi. This official conduct consists of affirmative acts intended to interfere with and hamper constitutionally protected activity, ~~including~~ including arrest, prosecution, intimidation and diverse acts of harassment. Furthermore, by refusing to discharge their legal duties, State officials encourage lawless acts by private citizens against COFO and its membership.

The Hon. Harold Cox has demonstrated his sympathy with the official policy of the State of Mississippi ~~which is designed~~ to maintain the Negro citizens of the State in a condition of total political disadvantage and to retain the

segregation of the races, both in violation of the United States Constitution. This conclusion is based, on information and belief, upon the following.

The New York Times, March 9, 1964, p.42 reports that in the course of proceedings in open court, Judge Cox said "he was interested in eliminating discrimination in the registration of voters 'but I am not interested in whether the registrar is going to give a registration test to a bunch of niggers on a voting drive,'" thereby demonstrating the Judge's fixed view that Negroes are "niggers," and all it implies in history, and that the First and Fourteenth Amendments to the United States Constitution are nullities in his court.

Upon information and belief, the latter point gains support from the record of litigation initiated before Judge Cox. As of November, 1963, the Judge has been affirmed on appeal only once in a reported civil rights case. 73 Yale L. Journal 90, 107 n.87. It is my further belief that his record subsequent to November 1963 is not substantially improved. Furthermore, upon information and belief, the Judge engages in

interminable delay with respect to voter registration suits brought by the United States, thereby frustrating the purposes of the Constitution and statutes of the United States.

It is my belief, based upon the foregoing, that Judge Harold Cox ~~x~~ could not fairly judge the within case in any respect. It is my belief that his bias against myself, my co-plaintiffs, and the class of citizens we represent, and his bias in favor of the defendants, all officers of the State of Mississippi, and the institutions they represent, is so fixed that the issues of fact and law involved will not receive the impartial judgment which is demanded by the laws of the United States.

In addition, ~~Lastly~~, the pending proceedings for contempt, initiated by Judge Cox, against the Attorney General of the United States, and the United States Attorney for the Southern District of Mississippi ~~is~~ Give, upon information and belief, further substantiation of the Judge's bias. It is my understanding and belief that these contempt proceedings are based upon the refusal of the Department of Justice to prosecute two or more civil

rights workers because in its opinion there is inadequate evidence to believe they have committed any crime. I believe that the Judge's insistence, nevertheless, on prosecution, indicates an attachment to an inconsistent application of federal law. Though he does not act with dispatch with respect to suits intended to enforce the Constitution, his behavior with respect to the Attorney General and the United States Attorney indicates his facility in doing so in proceedings which are directed against those who engage in civil rights activity.

WHEREFORE, pursuant to Section 144, Title 28, U.S.C., plaintiff demands that the Hon. Harold Cox proceed no further in this cause, and that another judge be assigned to hear this action.

FURTHERMORE, the Hon. Harold Cox is disqualified from this case because he is so connected with one of the party defendants, that it is improper for him to proceed any further.

Upon information and belief, there is now pending before the United States Court of Appeals for the Fifth Circuit an application for a writ of prohibition directed against Judge Cox which is intended to quash the contempt proceedings against

the Attorney General and the United States Attorney. As reported in the New York Times of October 29, 1964, the Judge will be represented in these proceedings by, among others, the Hon. Joe T. Patterson, Attorney General of Mississippi, ~~and~~ one of the party defendants to the within suit.

The necessarily intimate relationship between an attorney and his client, built as it is upon ~~mutual~~ mutual trust, raises the serious question whether the client-Judge will be able to maintain the indispensible impartiality towards a law suit in which one of the parties is the Judge's personal attorney. I do not insinuate that it is improper for the Attorney General of Mississippi to represent a federal judge in the proceedings, nor do I insinuate that the political views of one are to be imputed to the other. I do urge, however, the impropriety of the judge sitting in judgment on a case in which his personal attorney is a ~~client~~ party.

WHEREFORE, pursuant to Section 455, Title 28, U.S.C., I move that the Hon. Harold Cox declare himself disqualified to sit on the trial or any preliminary proceeding of this cause and that he cause that fact to be entered on the records of the court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

DAVID DENNIS, ET AL,

PLAINTIFFS,

AGAINST

PAUL B. JOHNSON, ET AL,

DEFENDANTS.

CIVIL ACTION
NO. 3618

AFFIDAVIT OF DISQUALIFICATION OF HON. HAROLD COX

STATE OF MISSISSIPPI)
SS:
COUNTY OF HINDS)

Hunter Morey, being duly sworn, deposes and says:

1. I am one of the named plaintiffs in the above-entitled action.

2. I believe and aver that Hon. Harold Cox, one of the judges appointed to hear the within action, is so connected with one of the defendants in this case as to render it improper for him to sit in any proceedings in the case.

3. The facts and reasons which form the belief that Hon. Harold Cox is disqualified from proceeding any further in the within case, because he is substantially connected with one of the party defendants, are as follows:

Upon Information and Belief: There is now pending before the United States Court of Appeals for the Fifth Circuit, an application for a writ of prohibition directed against the said Judge Cox, which is intended to quash contempt proceedings against the Attorney General of the United States and the United States Attorney for the Southern District of Mississippi. It is my understanding and belief that these contempt proceedings are based upon the refusal of the Department of Justice to prosecute two or more civil rights workers, because, in the opinion of the Department of Justice

there is inadequate evidence to believe they have committed any crime. Hon. Harold Cox has insisted, nevertheless, on prosecution, with the result that a writ of prohibition has been directed against him on the grounds that he does not consistently apply federal law.

As reported in the New York Times of October 29, 1964, the Hon. Harold Cox will be represented in these proceedings by, among others, the Hon. Joe T. Patterson, Attorney General of Mississippi, one of the named party defendants to the within suit.

The necessary intimate relationship between an attorney and his client, built as it is upon mutual trust, raises the serious question whether in the instant case the client-Judge will be able to maintain the indispensable impartiality towards a law suit in which one of the parties is the Judge's personal attorney. I do not suggest that it is improper for the Attorney General of Mississippi to represent a federal judge in the proceedings referred to above, nor do I suggest that the political views of one are to be imputed to the other. I do urge, however, the impropriety of a judge sitting in judgment on a case in which his personal attorney is a party.

WHEREFORE, pursuant to Section 455, Title 28, U.S.C., I move that the Hon. Harold Cox declare himself disqualified to sit on the trial or any preliminary proceeding of this cause and that he cause that fact to be entered on the records of the court.

Sworn to before me,
this 30th day of
November, 1964.

/s/ Carl A. Jones

Comm Exp 7/7/68

/s/ R. Hunter Morey
(Plaintiff)

RESEARCH MEMORANDUM FOR DISCUSSION
Wednesday, November 4, 1964
5:30 p.m.
LCDC Office

A. RECUSATION PETITION.

1. Can we recuse because of general attitudesstoward civil rights

2. Can we recuse because of bias against Negroes.

3. Can we recuse because defendant was retained as Judge's attorney.

4. Would a recusation petition still be timely.

5. Gather facts on Cox.

6. Gather facts on Mize.

7. Review petition (see attached).

B. DISCOVERY PROCEEDINGS.

1. Must we await decision on Motion to Dismiss.

2. Prepare list of potential deponents, and information to be sought.

3. Draft motion.

C. OTHER LAWS TO BE ADDED.

1. Review all available bills.

2. Draft amendment.

D. SERVICE OF COMPLAINT.

1. Review additional parties to be served.

2. Arrange for service.

3. If amendment is necessary, prepare.

E. As to each law being attacked as unconstitutional on its face, even without any evidence being introduced, prepare memorandum of law.

F. To the extent the statutes are not unconstitutional on their face without further evidence:

1. Can they be voided because of their background:

a. The general legislative intent and purpose of their passage.

b. Their passage was part of a specific illegal conspiracy.

c. Their passage was part of a general pattern for the maintenance of illegal segregation.

d. Past facts show this further use will be to maintain illegal segregation, so that, properly interpreted in the light of the facts, they become unconstitutional on their face.

e. Develop facts on the background of each law being challenged.

2. Can they be voided because of events subsequent to their passage:

a. Because of specific unconstitutional application in several instances for each statute.

b. Overall unconstitutional application, i.e. used only against civil rights workers and Negroes, never against anyone else.

c. Facts on actual cases of use.

d. Facts on patterns of use, i.e. statistics.

e. Should amendment to complaint be prepared permitting introduction of above facts.

G. IF THE STATUTES ARE CONSTITUTIONAL.

1. Will an injunction lie against their discriminatory enforcement.

2. If so, can not many more criminal statutes be added to the complaint.

3. If so, will the three judge Court hear this portion of the case also.

4. If not, will proof of several specific local situations showing specific "conspiracies" for discriminatory enforcement permit injunction against those specific law enforcement officers.

5. If so, should they be joined in this action.

6. If not, should separate actions be brought.

H. MISCELLANEOUS.

1. Retainer should be arranged for.

2. Appearances should be filed. Whose? Who will prepare?

3. Should we raise question of admission to practice in the Southern district

4. Are there other procedural improvements that should be made in the compla

WEISMAN & WEISMAN
ATTORNEYS AT LAW
49 LEAVENWORTH STREET
WATERBURY 2, CONNECTICUT

AREA CODE 203
754-2105

HERMAN J. WEISMAN
1909-1961

H. JOHN WEISMAN
FRED B. ROSNICK
PETER MARCUSE

NORMAN S. DRUBNER

December 8, 1964

In re: Dennis V. Johnson

Distinguished Counsel:

Attached you will find a draft of the brief, which has not yet even been proof read.

The length of the brief is limited largely because I feel further discussion would honor their arguments too much, and I believe as ours stands it says what we have to say.

There are several points that they could have raised but did not. First, of course, is the Constitutional question which I certainly think we should not mention since they did not.

The potential problem on the class action, which again the defendants have not raised fully, breaks down into two questions:

1. Do we represent those that have been threatened under these laws, if our individual plaintiffs have not been threatened?

2. If our individual plaintiffs have not been threatened, is the action premature and do we thus have no standing to sue?

The ultimate answer to both these questions lies in the fact that we are really arguing that the very passage of these bills, even without a specific threat of enforcement, deprives us of rights, and further that the deprivation of the rights of others by these statutes indirectly deprives us of our rights. This ultimately is the only way we can argue that mistreating minors or taking away the Charter of Tougaloo College deprive us of our rights, since we are not minors and do not want to go to Tougaloo.

In our brief I have deliberately fudged this issue by saying that the allegations of the Complaint are sufficient to prevent the granting of the Motion to Dismiss at this time; I see no reason why we should point out to them their own arguments and then try to answer them. This is an additional reason for requesting an oral argument.

I am planning to send this brief, the attached letter, and the recusation petition to Marian Wright to get Jess Brown's signature, and to mail to all of the Judges tomorrow, so please give me your comments by telephone immediately upon receipt if at all possible. I thought I would have Jess Brown sign as

counsel and myself as of counsel on the brief since I see we can get no other signatures in time.

Have fun!

Very truly yours,

WEISMAN & WEISMAN

By Peter Marcuse
Peter Marcuse

PM:ek
Inclosure

R. J E S S B R O W N

125½ North Farish Street

Jackson, Mississippi

December 8,,1964

Honorable Judge Harold Cox
United States District Judge
P. O. Drawer 2447
Jackson, Mississippi

In re: Dennis V. Johnson

Dear Judge Cox:

We inclose herewith the plaintiffs' Brief in Opposition to the Motion to Dismiss, and a Petition for Recusation.

We believe that it may be helpful to the Court to hear oral argument on the Motion to Dismiss, and we consequently request assignment for oral argument, if the Court deems it proper, at the earliest convenience of the Court.

Respectfully yours,

R. Jess Brown

Peter Marcuse
49 Leavenworth Street
Waterbury, Connecticut

B:M:ek
Inclosure

(For this purpose, I believe the original of this letter should be more properly addressed to Judge Rives.)

Lawyers Constitutional Defense Committee, Inc.

Ninth Floor, 156 Fifth Avenue, New York, N. Y. 10010

(212) YU 9-7530

President

LEO PFEFFER
General Counsel
American Jewish Congress

Vice-Presidents

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Counsel, Commission on Religion and Race
National Council of the Churches of Christ

CARL RACHLIN
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American Civil Liberties Union

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National Affairs Director
American Jewish Committee

ROBERT L. CARTER
Special Counsel
National Association for the Advancement of Colored People

The Rev. ROBERT F. DRINAN, S.J.
Dean
Boston College Law School

JACK GREENBERG
Director-Counsel
NAACP Legal Defense and Educational Fund

CLARENCE B. JONES
Counsel to the
Rev. Dr. Martin Luther King, Jr.

HOWARD MOORE, JR.
Counsel
Student Non-violent Coordinating Committee

Executive Secretary
HENRY SCHWARZSCHILD

December 8, 1964

Carl Rachlin, Esq.
CORE
38 Park Row
New York, N.Y. 10038

Dear Carl:

I am herewith sending you a copy of our affidavit of recusation against the Hon. Harold Cox in the case of Dennis v. Johnson. This is to be filed in Jackson no later than Monday, December 14, together with our answering brief on the motion to dismiss, which has been prepared by Peter Marcuse.

We are taking care of sending copies of the recusation to the other members of our three-judge court and to the Mississippi attorney general's office. It was you, I believe, who very sensibly suggested that we should also send a copy of the recusation to Judge Tuttle, since he was the one who appointed the court.

Will you send the enclosed copy, therefore, to Judge Tuttle promptly after you have my word that the papers have been filed in Jackson on Monday? And I should like to have a carbon of your covering letter to Judge Tuttle.

Burke Marshall, in a recent conversation, expressed an interest in seeing the recusation as well. I do not suppose there is any objection in my sending him a copy, is there?

Cordially,

Henry Schwarzschild
Executive Secretary

HS:c
Enc.

December 14, 1964

Peter Marcuse, Esq.
49 Leavenworth Street
Waterbury, Connecticut

Re: Dennis v. Johnson

Dear Peter,

Let me thank you for your fine brief in the Dennis case.

I have a special interest since, in a small way, I gave birth to the thought flying down to Jackson. Please keep us in touch, particularly as to any help I can give you.

With best personal regards,

Cordially,

Carl Rachlin
General Counsel

cc: Mr. Henry Schwartzchild
Bert Perkell, Esq.

CR:hdl

1/18/65

MEMO

RE: DENNIS vs. JOHNSON

* HB 14 Apparently varies from HB 546 only by adding the work "unreasonable" before the type of picketing that is prohibited.

HB 15 Provides for fingerprinting and photographing of persons charged with misdemeanors; this practice had been undertaken against civil rights workers arrested prior to passage, although prior law apparently only permitted it for felonies.

HB 246 Provides for appointment of special deputy sheriffs among qualified electors where needed.

* HB 6 Prohibits assignment of pupils in such a manner as to adversely affect the education of other pupils.

HB 290 Permits seperation of students by sex where necessary for morality or health.

HB 870 Permits the obtaining of injunctions against individuals entering the State for subversive purposes.

HB 180 Prescribes penalties for bearing a second illegitimate child.

HB 881 Regulates the admission of out of state attorneys (I do not know to what extent it is more restrictive than the prior act).

FB 1501 Provides for a study of the possibilities of a state support of private school systems.

* SB 1525 Provides penalties for actions intimidating a judge, jury, witness or an attorney.

SB 1550 &
SB 1604 Provides apparently for increases in fees payable to court reporters for transcripts, and requires immediate notice to them if one is desired; (apparently more restrictive and expensive than prior statutes)

SB 1598 Limits preemptory jury challenges to four, where there are multiple parties.

SB 1607 Prohibits boycots.

SB 1702 Requires a high school education to serve on a county school board.

SB 1614 Provides for appointment of counsel by the court(and may operate to the disadvantage either of the defendant or of out-of state counsel desiring to represent him.)

SB 1880 Provides for payment by the State of penalties inflicted on registrars violating Federal Court orders.

SB 1896 Provides for payment of $50,000.00 to the State Sovereignty Commission.

SB 2026 Provides penalties for those from out of state adding in the commission of crimes.

SB 2027 Provides that criminal syndicalism is a crime.

SB 2136 Restricts the activities of freedom school and public health centers by requiring registration, etc.

? A group of bills relating to the establishment of a private school system and providing other alternatives to court ordered intergration

* These bills we are certain have been passed; as to the others, we have no definite information.

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ATTORNEYS AT LAW
49 LEAVENWORTH STREET
WATERBURY 2, CONNECTICUT

HERMAN J. WEISMAN
1909-1961

H. JOHN WEISMAN
FRED B. ROSNICK
PETER MARCUSE

NORMAN S. DRUBNER

AREA CODE 203
754-2105

January 19, 1965

Mr. Henry Schwarzchild
c/o LCDC
156 Fifth Avenue
New York, New York

In re: Dennis V. Johnson

Dear Henry:

Summarizing the present status of this case, and our conversation of Friday:

1. You have already asked for, and will continue to try to obtain, from the appropriate sources, the following:

a. Five communities in which the laws we are challenging have been most used, and discriminatory patterns can be best proved (and in which depositions may be of most help in the local situation);

b. The names of the individuals who should be made defendants in these communities;

c. The names of individuals who can be added as plaintiffs in our suit who have been directly affected by each of the laws involved.

2. I am attaching a list of the additional laws concerning which I have some information which were passed at the 1964 Session, and which seem to me to be worth challenging. As to these:

a. You will find out which were passed and which were not;

b. You will get that background information which would be helpful on the question of whether each of these should be challenged; I have commented on information that could be useful on several;

c. I will then circulate those that I believe should be challenged to the others on our committee;

d. We will then amend the Complaint to include them. I would like to get all of this done as quickly as possible, so that we can

still amend as of right rather than having to ask the court's permission.

3. Bert Perkel is working on the Recusation Petition. I will discuss with him the possibility of using the additional information on Cox you sent me to file a further Recusation Petition, to Cox himself, under 28 U.S.C. 144; whatever decision is made here, we will circulate to our committee for approval.

4. I have asked the Harvard Law School research group to check out the following three questions; copy of my letter to them is attached.

a. Can we require the governor of a state to submit to a deposition or subpoena him to testify at a trial.

b. What type of expert testimony is admissible on legislative intent.

c. Evidentiary questions on the admissibility of newspaper stories.

5. I would propose that, depending in part on the results of 1 above, notice of the taking of depositions be served on a number of individuals, scheduled for February 11 and 12, 1965. Those whose depositions should be taken would include, to the extent possible:

a. Unsympathetic reporters in New Orleans and Memphis.

b. Unsympathetic reporters from the Jackson papers and radio.

c. Certain legislators, not including the key committee chairman.

d. Law enforcement officers in two or three of the five communities to be decided upon.

e. Officers of selected state agencies which may have statistical or written material relevant to the proof of our case.

6. Just before the taking of these depositions, and during the weekend after their taking, I propose that we interview in detail the friendly witnesses whose names we have, from Claude Sitton, and others; to the extent that they are friendly, I believe we can obtain their testimony in advance without revealing it to the defendants and without embarrassing them, and simply call them at the time of trial to place their testimony on record.

7. I propose that we ask to have a master appointed to take the depositions of the Governor, the Attorney General, and the key legislative committee chairman, as well as those witnesses who have proved recalcitrate during the first round of depositions. The Motion for the Appointment of a Master can perhaps be filed at the same time as the first notices of depositions are given, with the thought that argument on it might perhaps be scheduled for the same period around February 12th.

8. If the above plan is followed, a tentative budget for the case bringing it prior to trial would be as follows:

1. Round trip to Jackson for first round depositions: $150.00 (Multiplied by the number of individuals going down).

2. Round trip to Jackson for second round depositions before a master: $150.00 (multiplied by the number of individuals going down).

3. Cost of stenographer, assuming, $375.00

4. Expenses, meals, over-night, etc, two trips: $150.00 (multiplied by the number of individuals going down).

I will be in touch with you as things progress on my end; let me know how you progress on yours,

Very truly yours,

Peter Marcuse

PM:ek

1/20/65

Re: Dennis V. Johnson

SUPPLEMENTARY MEMO

Since the attached was typed, I received a call from Henry Schwarzchild indicating the receipt of orders from the Southern District Court setting February 5th as Motion day, and setting February 12th as the date for pre-trial. I have not yet seen the orders and am unclear on details.

From what I now know, it seems to me that this ties in ideally with what we have proposed, except that it accelerates the time. Specifically, I would think that we would try to schedule the first round of depositions and the motion for the appointment of a master for the 5th of February and have our amendments in by then; if they are not in before the answer is filed, we can schedule ~~or~~ motion to amend for that date also. The second trip to take the depositions before the master, we should then try to schedule for February 12th, so that we can take care of the pre-trial at the same time.

I will discuss this further with Henry by 'phone tomorrow when I see the Court's orders, and I would expect he will try to reach each of you by 'phone promptly thereafter.

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1909-1961

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ALAN H. HERTZMARK

AREA CODE 203
754-2105

October 21, 1965

Mr. Will S. Wells, Esquire
Assistant Attorney General
State of Mississippi
Department of Justice
Jackson 5, Mississippi

Dear Will:

Re: David Dennis/Paul B. Johnson,
Civil Action No. 3618

Confirming our telephone conversation of yesterday, it is agreeable to the plaintiffs that the period of time allowed for the filing of answers to all of the interrogatories filed by us be extended to November 1, 1965, it being understood that answers to each of the interrogatories will be filed on or before that date.

Very truly yours,

WEISMAN & WEISMAN

By_____
Peter Marcuse

PM:m

MSS SELFRE
546

IN THE MATTER of RALPH DENNIS NEW YORK 1964

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STATE OF NEW YORK - SUPREME COURT

APPELLATE DIVISION - FOURTH DEPARTMENT

IN THE MATTER

OF

RALPH DENNIS

Brief for the Appellant

Submitted by:

FAITH A. SEIDENBERG, ESQ.
ATTORNEY FOR APPELLANT
Office & P. O. Address
Brockway Lane
Fayetteville, New York

To be argued by
Faith A. Seidenberg, Esq.
Syracuse, New York

STATE OF NEW YORK - SUPREME COURT

APPELLATE DIVISION - FOURTH DEPARTMENT

- -

IN THE MATTER

OF

RALPH DENNIS

- -

BRIEF FOR THE APPELLANT

Statement.

This is an appeal from an Order made in the above proceeding, committing the appellant to the Elmira Reception Center, Elmira, New York, for a term not to exceed three years, for Juvenile Delinquency, said Order having been made by the Honorable Leo J. Yehle, Judge of the Family Court, onondaga County, on t he 2nd day of April, 1963, and from each and every part of said order and judgment. The Notice of Appeal from said order was duly filed on the 8th day of April, 1963.

Facts.

On November 27, 1962, a Tuesday, at approximately 3:30 p.m., the appellant, Ralph Dennis, A fifteen year-old negro boy was arrested by two police officers in his home and taken to police headquarters. There is testimony, (page 17), to the effect that appellant was punched repeatedly about the chin and mouth, and even a week later, when applicant's mother first saw him, his face was still swollen and his lip was cut. Appellant was not allowed even to put a shirt on before being taken to the police station. Appellant was questioned until approximately

9:30 P. M. and then taken to the Hillbrook Detention Home. Appellant's mother, with whom he resided, was not notified.

= On Wednesday, November 28th, 1962 and Thursday, November 29th,1962, appellant was taken repeatedly to the police headquarters and questioned. On Friday evening, November 30th, 1962, appellant signed three separate confessions.

Appellant had then been in custody four days; Tuesday, Wednesday, Thursday and Friday. He had been awakened in the middle of the night, (page 22 of the minutes), and questioned on his bed. He had been awakened early in the morning. He had been questioned by teams of police. He had been given multiple lie detector tests. He had been threatened.

During these four days, no one that could have been of any help to him had been allowed to see him. Although his mother had tried repeatedly, a full week was to pass before she was finally allowed to see her son. No other member of his family saw him. He saw no lawyer. He stood alone for four days while an admitted battery of police questioned him unendingly.

After he signed the three confessions, only two of which were ever introduced by the District Attorney, although the police (page 40, Officer Stapleton, of the minutes), admitted that there were three, he was brought before the Mayor, several other officials and the story was given out to the newspapers and television stations.

On November 28th, 1962, one day after he had been picked up, a charge of violation of probation was placed against him. After habeas corpus proceedings were instituted, he was finally brought before the Family Court of Onondaga County on December 18th, 1962, on the above charge.

He was not charged with Juvenile Delinquency, until January 11th, 1963.

Therefore, he was held without charge of any kind for three weeks, and was not charged with the case now before the Court for six and one-half weeks from the start of his detention.

During the next several weeks, he was again questioned and was taken out by the police for several hours at a time in order to locate the missing purse. On the night of November 30th, 1962, Ralph Dennis was kept out until approximately 1:00 a.m. according to the testimony of Mr. Dicranian, Director of the Hillbrook Detention Home, (page 58). Although the purse was never found, the police continued to harass the boy. They questioned him repeatedly during the months of January and February, 1963, although objection was made by his attorney in Court, Before the Family Court Judge on January 39, 1963, and again on March 14, 1963 (p.).

POINT I

THE APPELLANT, RALPH DENNIS, HAD BEEN DEPRIVED OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, IN THAT THE CONFESSION WAS DERIVED UNDER INHERENTLY COERCIVE CIRCUMSTANCES.

In 1961, the United States Supreme Court, Culombe v. Connecticut, 367 U.S. 568, reversed a murder conviction and held that the defendant's confessions should not have been admitted into evidence in accordance with the standards for admissability demanded by the "due process" clause of the Fourteenth Amendment of the United States Constitution.

The Court asserted that when an adult is questioned by police, "he is faced with the task of overcoming by his lone testimony, solemn official denials. The prisoner knows this - knows that no friendly or

disinterested witness is present - and the knowledge may itself induce fear". The opinion stressed that confessions may be coerced by other means besides the "rubber hose" and "relay questioning." In describing "subtler devices" used "to make a suspect the unwilling collaborator of establishing his guilt", the Court cited the general atmosphere of the police station and the belief by defendant that he is obligated to speak.

The defendant had been detained in the Culombe case for four days prior to his confessions. If the Supreme Court is shocked by a four-day detention, during which time the defendant undergoes police interrogation in an unfriendly atmosphere, unaided by counsel, the question arises whether similar police interrogation for a four-day period will be tolerated <u>in the case of a child.</u>

In Haley v. Ohio, 332 U.S. 596 (1948), the United States Supreme Court held that the confessions of a fifteen year-old boy was involuntary and hence inadmissable as evidence. The boy was questioned without benefit of "friend" or counsel", for five hours and finally signed a confession after being advised of his constitutional rights, (page 601). The Court declared: "<u>What transpired would make us pause for careful inquiry if a mature man were involved.</u> And when, as here, a mere child - an easy victim of the law - is before us, special care in scrutinizing the record must be used." (Emphasis added).

The Court stated, that "Age fifteen is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens . . . we cannot believe that a lad of tender years is a match for police in

such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him . . . no counsel or friend was called during the critical hours of questioning."

The case was regarded as "disregard of the standards of decency." In summing up the factors which lead to the decision of the Court, it was stated: "The age of petitioner, the hours he was grilled, the duration of his quizzing, the fact that he had not friend or counsel to advise him, the callous attitude of the police towards his rights, combine to convince us that this was a confession wrung from a child by means which the law should not sanction. Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."

In 1962, the Supreme Court once again had the opportunity to review a murder conviction which was based on the confession of a fourteen year-old boy. In Gallegos v. State of Colorado, 370 U. S. 49 (1962), the boy was held for five days without seeing a lawyer or parent before he was asked to sign a confession. The Court held that the confession was coerced despite the facts that: the boy admitted the crime immediately upon arrest; his mother was told that she could see him during visiting hours; there was " no evidence of prolonged questioning"; he did not ask to see a lawyer or his parents; and there was testimony which showed that the police advised the boy to see a lawyer.

In the instant case, Ralph Dennis, who had just turned fifteen, four weeks prior to his arrest, was held four days, faced prolonged questioning, was unable to see his mother, was questioned during the early hours of the morning and late at night. The facts

show that Ralph Dennis endured greater pressure and there were more violations of individual rights in the Dennis case than in the Haley and Gallegos cases.

The Supreme Court, in the Gallegos case, summed up their reasons for finding that the confession was coerced. "The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the Judges of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend - all these combine to make us conclude that the formal confession on which this conviction may have rested, was obtained in violation of due process."

In accordance with the Supreme Court decisions which has decided the question, the Family Court recently held in the Matter of Rutane, that a confession obtained from a thirteen year-old boy, after seven hours of detention, was obtained under inherently coercive circumstances which violated the Fourteenth Amendment of the United States Constitution. The Court based its decision on the seven hour detention and the fact that the boy was taken to the police station, violating Section 724(a) of the Family Court Act.

Ralph Dennis was arrested in his home after being beaten by police. He was then taken to the police station in violation of Section 724(b) of the Family Court Act. His parents were not notified in violation 724 (a) of the Family Court Act, and after four days of constant questioning, threats, lack of sleep and three lie detector tests, he supposedly "confessed". The boy's mother was not permitted to see him and was turned away each day by the police during the seven days that Ralph Dennis was held incommunacado.

The "confessions" that Ralph Dennis signed were obviously the result of constant badgering and confusion. The boy testified that he

finally agreed to answer in the affirmative any questions asked of him. Indeed his testimony is corroborated by the typist, who is also a Commissioner of Deeds, when she said that the police officers "told" Ralph what to say in his confession.

"By the Court: Which statement are you talking about?

A. Both, the first one I don't believe the officers said very much about it. <u>They told Ralph what he had to give me.</u> In the second statement Officer Stapleton and Mahar did question him until they were called out of the office.

By the Court: Do you know how far down the statement that was?

A. I couldn't tell you now.

By the Court: Did you question from then on?

A. Yes sir.

Q. Was Mrs. Dennis there?

A. Not to my knowledge.

Q. Was there a lawyer there?

A. No, not to my knowledge.

Q. That's all. I would like to again object - - -

By the Court (Interrupting) You can object and you can reserve your right if you want to submit anything. (To witness) Did you say they told Ralph what he was supposed to give you?

A. No, the first statement I took was for a warrant to enter the Dennis home for property or clothing or something. They told Ralph as to what he had to give me on paper--What he wore that day.

By the Court: That's in regard to the first statement?

A. That's right

By the Court: Was there anything like that in regard to the second statement?

A. I can't remember whether that was included in the second statement or not, his clothes, a description of the clothing he wore.

By the Court: They told him to tell you what clothes he wore?

A. When I questioned Ralph I asked him about the clothing he wore and they helped me so they could find the clothing.

By the Court: There was a question about getting a search warrant to find the clothing?

A. I believe that was it."

The"confessions" submitted into evidence were obviously composed of a pack of coerced statements which never occured. The confession states that the boy, after committing the act, ran away and went "Downtown" where he met certain friends. In actuality though, he was seen in the theatre by four people and he left the theatre at 7:00 p.m. with his friends. If the boy confessed to the truth, why did he not say that he went back into the theatre and subsequently left at 7:00 p.m.?

The boy's"confessions" contain other false statements. He "confessed" to wearing clothes that he did not actually wear; he "confessed" to walking up to the women and then grabbing the purse and this directly contradicts the statement of the witness, Miss Lynch, to the effect that the actual perpetrator followed the women for quite a distance. Although the appellant supposedly "volunteered" the confession, (as testified to by Officer Stapleton), he never told where the purse was located. Why did he not "volunteer" that information if he actually knew? Indeed the appellant was forced to take the police on various trips throughout the city looking for the purse. This strange behavior is not indicative of a boy who is telling the truth but

rather, shows police pressure.

The appellant, who is in a special or slow class in school, testified on re-direct examination that he did not read the statements carefully. On direct examination he was ordered by the court to answer "yes" or "no", as to whether he read the confession. This order by the court, to this crucial question, overlooks the importance of how he read the confession and at what speed.

Q. Did you read it yes or no?

A. Not that good.

By Mr. Canestrano: I move that that be striken out as not responsive.

By the Court: Answer the question, yes or no, whether you read it or not."

POINT II

THE DECISION WAS NOT BASED ON A PREPONDERENCE OF THE EVIDENCE AS REQUIRED BY SECTION 744 OF THE FAMILY COURT ACT.

Aside from three policemen who testified as to the three confessions, the prosecution introduced the testimony of an extremely unreliable teen-age witness. The teen-age girl had been in detention for several months and was subjected during that time to prolonged interrogation. In the girl's own words, she was questioned at one point, "for about a week. Maybe more than that.....a lot of times". The girl was in a dazed condition throughout the time her testimony, as can be determined by the District Attorney's comment to her concerning her "staring". Her testimony shows repeated refusals to answer questions put to her by the prosecution, the defense, and by the Court. There were great lapses of time between her answers and the questions, as can

be seen by the testimony. The girl claimed she did not remember some important facts, which would have contradicted her testimony. For example, the length of time she was with the appellant on Novembember 24th, 1962, (a fact which she did not remember), would be vital as a comparison with the testimony of appellant's witnesses.

The girl testified that the crime occurred between 4:00 p.m. and 4:30 p.m., and yet the sole witness to the crime, Miss Lynch and police officers, testified that the crime occurred at 5:30 p.m. The girl made other sworn prior contradictory statements to the effect that she did know Ralph Dennis at the time of the crime. This statement coincides with his testimony to the same effect. Her prior statements do not incriminate the appellant in any manner. Indeed, if the appellant's confession were true, why did he not mention her?

Although the girl's behavior was strange, although she had to be helped into the witness chair, although the District Attorney had to recall the witness, although it was necessary for the District Attorney to declare the girl a hostile witness, although the girl refused to answer questions, although the girl continually stared into space, and although the girl's answers were chiefly "yes" and "no", although the unreliability of the witness was obvious, a motion for an examination was denied!

The sole witness to the crime testified that she was unable to identify the appellant. Indeed, she maintained that she could not tell whether the perpetrator was caucasian or negro. Miss Lynch testified that the perpetrator was following them for quite a distance. This statement means that Ralph Dennis' remark that he allegedly walked up to the women, allowed them to pass, and then grabbed the purse, was false. Indeed, if he walked up to the women, Miss Lynch would have been able to identify, at least, the perpetrator's race.

The defense introduced testimony by the assistant manager of the theatre, to the effect that the appellant was in the movies that day. Further testimony by Edward Burton showed that, except for two fifteen minute periods, the appellant was with him in the movies all day. Testimony by Robert Eddick and Bruce Drury further showed that Ralph Dennis was in the movies from approximately 3:00 p.m. until 7:00 p.m.

The district attorney did not present any theory of the case, nor any summation at all, which contradicts appellant's case. There was no explanation offered by the District Attorney as to the obvious false statements in the confessions and as to how the appellant could have been the perpetrator when he was in the movies at the time the crime was committed.

POINT III

THE ARREST OF RALPH DENNIS ON THE 27th OF NOVEMBER, 1962, was improper.

Under Section 721 of the Family Court Act, "A peace officer may take a person under the age of sixteen into custody without a warrant in cases in which he may arrest a person under Section 177 of the Code of Criminal Procedure." (Emphasis added).

In the recent case of People v. Mangino, 236 N.Y.S. 2d 439 (1962), the Court held that an arrest without a warrant is improper when made on suspicion that defendant was actually engaged in criminal activities. "Suspicion alone . . . is insufficient to sustain probable cause for a lawful arrest." Id at 441. In Mangino, the defendant was in his automobile when arrested whereas the arrest of Ralph Dennis occured in the boy's home.

The arrest of a fifteen year-old boy in his home while the boy is caring for two infants, need not be consumated without a warrant. If there was sufficient evidence to enable a policeman to reasonably believe that the boy committed the act, a warrant could have been secured from a magistrate.

In the instant case, there was no such reasonable belief that Ralph Dennis was involved in the purse-snatch. It is submitted that the Family Court erred in not allowing the arresting officer to answer the question, "Could you have gotten a warrant?"

In allowing for the arrest of children without a warrant, the Family Court Act refers to the Code of Criminal Procedure, Section 165, the defendant upon arrest must be taken before a magistrate, "without unnecessary delay." (Emphasis added). The Family Court Act, in allowing for the arrest without a warrant as in situations under Section 177 of the Code of Criminal Procedure, must be read to require other protection for the arrested child which is specifically listed in the Code of Criminal Procedure and the Family Court Act.

In other words, can it be seriously argued that the Family Court Act adopts Section 177 of the Code of Criminal Procedure for purposes of arrest and does not adopt other sections of the Code of Criminal Procedure which insures proper protection for those persons who are arrested?

In the instant case, the boy was arrested without a warrant on November 27th, 1962, and appeared before the Family Court on December 18th, 1962, on another matter. His first appearance before the Court on the Charge on which he was arrested on was on January 11, 1963. From the time of his arrest until January 11, 1963, he was continually questioned by the police. Indeed, even after he appeared in Family Court on January 11, 1963, police interrogation continued despite a motion by defense counsel to desist in this practice.

Thus, it is submitted that an arrest without a warrant cannot be lawful if other protection afforded to those arrested are disregarded.

POINT IV

THE MOTION TO DISMISS SHOULD HAVE BEEN GRANTED ON A

BASIS OF SECTION 729 AND SECTION 747 OF THE FAMILY COURT ACT.

The appellant, Ralph Dennis, was arrested on November 27th, 1962, and held in custody without hearing of any kind until December 18th, 1962, and without a hearing on the charge before the Court, until January 11th, 1963.

The appellant, although having been picked up on November 27th, 1962, and having signed three confessions on November 30th, 1962, was not taken before a Judge on any charge whatsoever until December 18th, 1962.

POINT V

THE MOTION TO DISMISS SHOULD HAVE BEEN GRANTED ON THE BASIS OF A VIOLATION OF SECTION 724(a), AND SECTION 724(b), OF THE FAMILY COURT ACT.

In the instant case, the boy was taken directly to police headquarters and questioned there for seven hours, which was a violation of Section 724(b).

After the boy was taken into custody, his parents were not notified, which was a violation of Section 724(a), of the Family Court Act.

POINT VI

THE MOTION TO DISMISS SHOULD HAVE BEEN GRANTED ON THE BASIS OF A VIOLATION OF SECTION 726 OF THE FAMILY COURT ACT.

It was the duty of the "facility receiving the child" to bring the child before the Family Court "as soon as practicably." In the instant case, the boy was not brought before the Family Court until three weeks after his arrest on another charge, and it was six and one-half weeks after arrest that he was finally brought before the Family Court on the purse-snatch charge.

POINT VII

THE MOTION TO KEEP RALPH DENNIS IN HILLBROOK DETENTION HOME, SYRACUSE, NEW YORK, SHOULD HAVE BEEN GRANTED IN VIEW OF NEW YORK CASES INSURING RIGHT TO COUNSEL.

On January 15th, 1963, defense counsel's motion to keep Ralph Dennis in Syracuse should have been granted in view of the upcoming hearing. The boy had been found to have violated a prior probation by being absent from school three days. By not permitting the boy to remain in Syracuse, the boy's right to counsel was greatly hampered. People v. Waterman, 9 N.Y. 2d 561 (1961).

The boy was actually detained in Syracuse from January 15th, 1963, until January 30th, 1963, although defense counsel was told by the Court, on January 15th, 1963, that the motion was denied and appellant was to be sent to the New York State Agricultural and Industrial School at Industry, New York.

During the time between January 15th, 1963 and January 30th, 1963 when defense counsel was told by the Court that appellant was at Industry, New York, the police were interrogating and threatening the appellant.

On the 30th of January, 1963, defense counsel, who had just learned of presence of appellant, asked the Court to prevent the police from interrogating the appellant. This request was made in view of the control that the Family Court has over the Hillbrook Detention Home, the place of the interrogation. The request was denied in spite of applicable New York cases which were on point and cited to the Family Court. (See pages 1 and 2, January 30th, 1963 hearing.)

The 1962 case of People v. Robinson, 166 App. Div. 2d 184, 224 N.Y.S. 2d 705 (4th Department), is representative of established New York Law to the effect that no statements made by defendant after arraignment may be used against him. Indeed, the Courts have shown disapproval of police interrogation

after arraigment, when the defendant has a lawyer to represent him. People v. Rodrigues.

In the instant case, the police had questioned the appellant from November 27th, 1962, through February, 1963. At the time of defense counsel's objection, the appellant had already been charged with the act three weeks before.

POINT VIII

THE FAMILY COURT, IN COMMITTING RALPH DENNIS TO THE ELMIRA RECEPTION CENTER, ELMIRA, NEW YORK, CONTRAVENED SECTION 758 OF THE FAMILY COURT ACT.

It is established law that a purse-snatch is not robbery in the first degree. In order to prove that robbery in the first degree has been committed, the prosecution must prove every element of the crime.

The necessary elements of robbery in the first degree were not substantiated and indeed were never even alleged during the adjudicatory hearing. There was no evidence offered to show that the perpetrator of the "purse-snatch" ever touched the victim. One police officer testified that she suffered certain injuries, but no force by the perpetrator was ever established. There was no relationship between the victim's injuries and the "purse-snatch."

POINT IX

THE MOTION TO ADJOURN IN ORDER TO HAVE A DISPOSITIONAL HEARING SHOULD HAVE BEEN GRANTED.

Under Section 746 of the Family Court Act, a disposition hearing follows an adjudicatory hearing. Section 745 of the Family Court Act stipulates what evidence is admissable on the dispositional hearing, and what burden of proof need be met for a determination.

Thus, the Family Court Act provides that defense counsel may have a dispositional hearing, as a matter of right, with full opportunity to

present material, competent and relevant evidence with regard to the child's disposition.

In the instant case, a request for a dispositional hearing, giving defense counsel opportunity to introduce evidence was denied. A Motion to grant a three-day adjournment so that certain relevant, material and competent evidence could be brought to the attention of the Court, was denied.

Section 749 of the Family Court Act expressly provides for an adjournment after an adjudicatory hearing or during a dispositional hearing.

Defense counsel was prohibited from introducing evidence, concerning disposition, which the Family Court Act regards as vital.

Defense counsel could have introduced vital information, concerning disposition, through the presentation of church, school and detention home officials.

Of vital importance in a dispositional hearing are remarks attributed to the Family Court, published in the press on January 9th, 1964. The article read: "Judge Peter Kolakowski said Dennis could be sent to Elmira Reformatory if he were convicted." This article appeared even prior to the first time the boy heard the charges. Defense counsel, having been notified by the press release that appellant might be sent to Elmira, should have been granted a dispositional hearing to argue that such a sentence would contravene the Family Court Act.

WHEREFORE, the conviction appealed from should be reversed, and the petition dismissed.

RESPECTFULLY SUBMITTED,

FAITH A. SEIDENBERG, ESQ.
Attorney for Appellant
Office & P. O. Address
Brockway Lane
Fayetteville, New York

FAITH A. SEIDENBERG

ATTORNEY AT LAW

—

471-8984

217A. STATE TOWER BUILDING
SYRACUSE, N. Y.

AUG 20 RECD

August 19, 1964

Mr. Carl Rachlin
165 West 46th St.
New York, New York

Dear Mr. Rachlin:

In the absence of Mrs. Seidenberg, who is presently in the south, I am enclosing herewith a copy of the Ralph Dennis brief which you requested sometime ago.

Sincerely yours,

Evelyn Zaleon

Evelyn Zaleon

Z
Encl.

MSS SEDFRE 546

DOMBROWSKI, JAMES, A. et al. VS. EASTLAND, JAMES et al. 1965

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Pierson v. Ray

Supreme Court of the United States

October Term, 1965

No. ——————

JAMES A. DOMBROWSKI and
SOUTHERN CONFERENCE EDUCATIONAL
FUND, Inc.,

Petitioners,

against

SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate; J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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New Orleans, Louisiana.

Attorneys for Petitioners.

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of Counsel.

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Supreme Court of the United States

October Term, 1965

No. ————

———o———

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,

Petitioners,

against

SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate; J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

———o———

To the Justices of the Supreme Court of the United States:

Petitioners, James A. Dombrowski and Southern Conference Educational Fund, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the orders of the United States District Court for the District of Columbia, dismissing the cause of action for injunctive relief and granting summary judgment against petitioners in the cause of action for money damages.

Opinions Below

The Court of Appeals affirmed the orders of the District Court in a *per curiam* opinion in which only two Circuit Judges joined. (Circuit Judges Burger and McGowan

joined in the opinion. Senior Circuit Judge Washington did not participate in the decision.) The *per curiam* opinion is not yet reported and is reprinted herein in Appendix A.

The District Court opinion by District Judge Holtzoff, dismissing so much of the complaint as sought injunctive relief, is not yet reported and is reprinted herein as Appendix B. No opinion was filed by District Judge Sirica in granting respondents' motion for summary judgment in the cause of action for money damages.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the concept of legislative immunity embodied in Article I, Section Six of the Constitution totally immunizes a United States Senator and a Senate employee from a law suit for money damages under the Civil Rights Act, where the complaint charges that the Senator and the employee participated in a conspiracy together with officials of the State of Louisiana, under color of unconstitutional state laws, to contrive illegal and false arrests of citizens and illegal raids and seizures of books, records and membership lists of civil rights organizations in violation of the Fourth Amendment, all for the purpose of deterring and frightening these citizens and many others from exercising fundamental rights under the First Amendment in their efforts to enforce the constitutional guarantee of Negro freedom and equality in the Southern states?

2. Whether summary judgment for the defendants should have been granted by the district court in an action

for money damages under the Civil Rights Act where the Court of Appeals concedes that absent considerations of legislative immunity the record reveals material disputed issues of fact relating to the participation of a Senator and a Senate employee in a knowing concert of action with state officials to utilize unconstitutional state laws to contrive illegal arrests and raids and seizures in violation of the Constitution and laws of the United States?

3. Whether the doctrine of legislative immunity embodied in Article I, Section Six of the Constitution protects an employee of the legislature from a law suit for money damages under the Civil Rights Act where the complaint charges and the record shows material disputed issues of fact relating to the employee's participation in a conspiracy together with state officials to utilize unconstitutional state laws to contrive the illegal arrest of citizens and illegal raids and seizures in violation of the Fourth Amendment, for the purpose of deterring and frightening these and other citizens from exercising fundamental constitutional rights in their efforts to enforce the guarantees of racial equality in the Southern states?

4. Whether, if the doctrine of legislative immunity embodied in Article I, Section Six is not available to this employee, the judicially developed doctrine of immunity of government officers developed by this Court in *Barr* v. *Matteo* is applicable to this employee and, if so, should the doctrine of that case be reconsidered by this Court?

5. Whether a complaint states a cause of action for equitable relief under the Civil Rights Acts where an injunction is sought restraining participants in a conspiracy with state officials to utilize state laws to contrive illegal arrests, searches and seizures in violation of the Constitution from using or disposing of the illegally obtained fruits of the unconstitutional raids and seizures?

6. Whether the reinstatement of the cause of action for equitable relief is required to implement and further the purposes of the mandate and decision of this Court in *Dombrowski* v. *Pfister*, 380 US 479?

Statement of the Case

The serious and substantial questions raised in this petition arise out of the factual context of the illegal arrests and raids under the color of unconstitutional Louisiana state statutes, already considered by this Court in *Dombrowski* v. *Pfister*, 380 US 479 (1965).

A—Statement of Facts

1. The Facts Preceding the Institution of the Present Action for Injunctive Relief and Money Damages

Petitioner Southern Conference Educational Fund, Inc., hereafter referred to as "SCEF", is a non-profit membership corporation organized under the laws of the State of Tennessee and maintains an office in the State of Louisiana (1a).[1] The purpose and function of SCEF as an association is to attempt to secure to Negro citizens the rights guaranteed to them under the federal Constitution and to participate in efforts to end all forms of segregation in the Southern states (1a). See *Dombrowski* v. *Pfister*, at p. 482. Petitioner, Dr. James A. Dombrowski, was then the Executive Director of SCEF and was a citizen of the State of Louisiana and the United States (1a, 20a). Both SCEF and Dr. Dombrowski were successful appellants in *Dombrowski* v. *Pfister, supra.*

Respondent Eastland is the senior Senator from the State of Mississippi and respondent Sourwine is the Chief

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[1] All references are to the printed joint appendix in the Court of Appeals.

counsel of the Internal Security Subcommittee of the Senate.

Sometime in the summer of 1963, private discussions were held between respondent Sourwine and one Jack N. Rogers, counsel to the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature concerning the records, lists and files of SCEF (50a, 51a).

On the afternoon of October 4, 1963, certain police officers of the Police Department of the City of New Orleans, Louisiana, together with officers of the Louisiana State Police and representatives of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, broke into and forcibly entered the office of SCEF in the City of New Orleans and proceeded to seize the entire contents of the office including the books and records of the organization, its ledgers, receipts, memoranda, membership lists, lists of contributors, vouchers, pamphlets and literature, together with many items of personal property belonging to Dr. Dombrowski. The office was totally ransacked and everything movable taken out (3a, 20a through 25a). Dr. Dombrowski was placed under arrest and booked for violation of Louisiana Revised Statutes 14:358 et seq. and 14:390 et seq., known as the Louisiana Anti-Subversive Laws (19a).[2] The same day officers of the New Orleans Police Department of the State Police, together with representatives of the Louisiana Joint Legislative Committee, proceeded to search the residence of Dr. Dombrowski in the City of New Orleans and seized many items of personal property from his house and from his automobile located nearby (21a). The circumstances of the arrests and raids were detailed by this Court in the

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[2] The provisions of the Louisiana law under which Dr. Dombrowski was arrested were later stricken as facially unconstitutional by this Court in *Dombrowski* v. *Pfister, supra.*

Dombrowski opinion. See footnote four, 380 US at 479, 480.[3]

The raids of October 4 and the arrest of Dr. Dombrowski were conducted purportedly under the authority of search warrants and arrest warrants issued on October 2nd by a Judge of the Criminal District Court of the Parish of Orleans. However, at a preliminary hearing, a Judge of the Criminal District Court for the Parish of Orleans, after taking evidence, summarily discharged the defendants. The state judge held that the arrest warrants were improvidently issued and that there was no reasonable cause for the arrests (19a). See dissenting opinion of Circuit Judge Wisdom in *Dombrowski* v. *Pfister,* 227 F. Supp., at 573. Moreover at a later stage in the state proceedings the state court granted a motion to suppress the seized evidence on the ground that the raids were illegal in violation of the Federal Constitution relying upon this

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[3] The text of the Court's footnote is as follows:

"The circumstances of the arrests are set forth in Judge Wisdom's dissenting opinion:

'At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under the direct supervision of the staff director and the counsel for the State Un-American Activities Committee. The home and office of the director of Southern Conference Educational Fund were also raided. Among the dangerous articles removed was Thoreau's *Journal.* A truckload of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's office, destroying its capacity to function. At the time of the arrests, Mr. Pfister, Chairman of the Committee, announced to the press that the raids and arrest resulted from "racial agitation."' 227 F. Supp., at 573."

Court's decision in *Mapp* v. *Ohio,* 367 US 643.[4] (The opinion of the state court granting the motion to suppress is set forth in Appendix C.) Consequently, under rulings of the Louisiana state courts both the arrests and raids were wholly illegal. As this Court pointed out in *Dombrowski,* "Later in October a state judge quashed the arrest warrants as not based on probable cause, and discharged the appellants. Subsequently, the court granted a motion to suppress the seized evidence on the ground that the raid was illegal." 380 US at p. 488.

The illegality of the raids was further underscored by the decision of this Court in *Dombrowski* directing that on remand the decree of the three-judge court shall include an order directing the "immediate return of all papers and documents seized." 380 US at p. 497.

However, despite the ruling of the state court in October that the arrest warrants were illegal and issued without probable cause, the books, records, documents, memberships lists and other articles which had been seized during the raids were not returned to the petitioners but were, secretly and without petitioners' knowledge, transferred to the possession of the respondents Sourwine and Eastland. Apparently, sometime prior to the raids discussions had been held between Rogers, the counsel to the Louisiana Joint Committee, and respondent Sourwine, during which the question of the records and files of SCEF was discussed. The uncontested record facts next show that sometime in the evening of the raids, October 4th, Rogers telephoned Sourwine informing him that the Louisiana Committee had obtained all the records, files, membership lists and other materials belonging to SCEF (53a). Respondent

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[4] The motion to suppress was made after indictments were returned following the dissolution of Judge Wisdom's temporary restraining order by the majority of the three-judge court. See 380 US at 484. The state court opinion was rendered subsequent to oral argument before the Court of Appeals in the present case.

Sourwine then appeared in Baton Rouge, Louisiana, the next morning (54a). He had in his possession blank subpoenas signed by respondent Eastland.[5] These subpoenas, according to respondent Sourwine's testimony, were served on Rogers that morning, although the subpoenas on their face were dated October 4th, the day of the raids (35a, 36a). Respondent Sourwine maintained this was a "stenographic error" (35a, 36a). The Superintendent of the Louisiana Police was "appointed" on the same day "custodian" of these records and documents by respondent Sourwine (37a). However, the physical location of the records and other material remained in Baton Rouge physically under the control of the state officials (37a). Respondent Sourwine later testified that the issuance of the blank subpoenas dated October 4th, was never authorized by the Internal Security Subcommittee of the Senate, and that these subpoenas were not specifically authorized by the Committee or the Subcommittee (35a, 36a).

These relations between respondent Sourwine and the Louisiana officials on the evening of the raids and the next day were unknown to the petitioners until the day of the preliminary hearing on October 25th when the Louisiana officials informed the state court that they could not comply with any order to return the documents and membership lists seized during the illegal arrests since they were technically in the custody of the respondents Sourwine and Eastland although physically still in the possession of state officials. Until that moment respondents' participation in the events of October 4th and 5th was completely unknown to petitioners or to the press or public.

Immediately after the ruling of the state court on October 25th voiding the warrants of arrest under the disclosure of respondents' role in the seizure of the docu-

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[5] The record reveals that respondent Sourwine had access to a "folder which contains a number of subpoenas signed by the Senator in blank" (36a).

ments, petitioners instituted in the United States District Court for the Eastern District of Louisiana, New Orleans Division, a federal plenary action under the Civil Rights Act and the Constitution, seeking injunctive relief and money damages. The action is referred to hereafter as the first action.[6]

Petitioners joined, as defendants in the first action, the Louisiana state officials involved in the raids together with respondent Eastland charging a conspiracy under the color of Louisiana state law to deprive the appellants of rights, privileges and immunities granted to them as citizens of the United States by the laws and Constitution of the United States (7a). The complaint was filed on Sunday morning, October 27th. A motion for a temporary restraining order restraining the defendants from removing any of the seized documents, records and other articles from their location in Baton Rouge, and from delivering them, or surrendering them in any way to respondent Eastland, was immediately presented to Federal District Judge Ainsworth of the Eastern District of Louisiana (29a). Judge Ainsworth was assured by representatives of the State that the seized material was then still at the State Police Headquarters in Baton Rouge. Judge Ainsworth thereupon directed that the motion be returnable before him Monday morning, October 28th, in New Orleans and ordered petitioners to notify the defendants in the action that the restraining order would be heard in the District Court that Monday morning (29a). The appellants notified respondent Eastland by telegram (29a).[7]

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[6] This action was entitled *Dombrowski* v. *Burbank*, #13,967, in the Eastern District of Louisiana, New Orleans Division.

[7] The telegram read as follows: "Federal Judge Robert Ainsworth has requested your presence in his office 9:30 AM, October 28th, to discuss an injunction enjoining turning over SCEF and Smith and Waltzer records to Senator Eastland" (59a).

The uncontested record facts are that on Sunday evening, October 28th, respondent Eastland notified respondent Sourwine by telephone of the receipt of this telegram and directed respondent Sourwine to telephone Baton Rouge at once and arrange to have all of the records, documents, membership lists and other materials transferred that night out of the State of Louisiana (60a). At about midnight, Sunday night, a vanload of material containing these records and documents was moved over the Louisiana state border to Woodville, Mississippi, through arrangements made by respondent Sourwine (29a) and was deposited with the clerk of the Chancery Court in Woodville (29a). On Monday morning, October 28th, attorneys for the Louisiana state officials informed the Federal District Judge that the records and material seized in the raid, the subject of the temporary restraining order, were no longer in the jurisdiction of the Federal District Court for the Eastern District of Louisiana and that the matter was therefore moot (29a).

Immediately thereafter petitioners filed the present complaint in the United States District Court for the District of Columbia, the residence of respondents Sourwine and Eastland.

2. The Initiation of the Present Complaint

The present complaint (1a-11a) paralleled almost identically the basic allegations of the complaint filed on October 27th in the Eastern District of Louisiana in the first action. The present complaint alleged that the defendants Thomas D. Burbank, Russell R. Willie, James H. Pfister, all state officials, and respondents Eastland and Sourwine, entered into a plan, agreement and conspiracy, under the color of Louisiana state laws and statutes, to deprive the petitioners of rights, privileges and immunities granted to them as citizens of the United States under the laws and Constitution of the United States. The complaint alleged

that pursuant to this conspiracy the defendants, under the color of certain Louisiana state statutes, planned and carried through raids of the petitioners' homes and offices, as well as causing the arrest of petitioner Dombrowski, in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States.

The complaint further alleged that the defendants conspired, under the color of the Louisiana state statutes, to seize books, records, lists of members, contributors and friends of petitioner SCEF who were engaged in efforts throughout the states of the South to implement the Equal Protection Clause of the Fourteenth Amendment. The complaint further alleged that these activities of the defendants was for the purpose of harassing, intimidating and deterring the petitioners, their friends, members and supporters from exercising federally-protected constitutional rights. The complaint further alleged that the illegal actions of the defendants, under color of the Louisiana state statutes, has resulted in serious damage to the plaintiffs.

The complaint further alleged that one of the central purposes of the conspiracy was to obtain possession of the membership lists of the petitioner SCEF, a civil rights organization. Since the decision of this Court in *NAACP* v. *Alabama,* 357 US 449, it has become increasingly clear that the enforced production of membership lists of organizations actively seeking enforcement of the Equal Protection Clause in the Southern states itself violates the Constitution, 357 US, at p. 462; see also *NAACP* v *Flowers,* 377 US 288; *Louisiana* v. *NAACP,* 366 US 293. The complaint charged that the respondents, together with the Louisiana state officials, sought to utilize the Louisiana laws as a pretext for the obtaining of the membership lists through raids and seizures, which they could not have otherwise obtained through lawful legislative process.

The complaint sought money damages in the amount of $250,000 for each plaintiff as well as appropriate injunctive relief.

B—Proceedings Below

1. Proceedings in the District Court

After the filing, and serving of the complaint upon those defendants who were Washington, D. C., residents, respondents Eastland and Sourwine,[8] a motion for a preliminary injunction came before the District Court for the District of Columbia on December 18th, 1963. Although petitioners sought to withdraw the motion in order to take a deposition of respondents in support of the request, the District Court, by Judge Holtzoff, entered an order from the bench dismissing so much of petitioners' complaint as sought injunctive relief against the defendants (12a-14a). Judge Holtzoff delivered an oral opinion in support of his conclusions that the granting of injunctive relief would "contravene the constitutional requirement of separation of powers and would exceed the jurisdiction of this Court" (Appendix B). Notice of appeal was duly filed from this order. The order of Judge Holtzoff left undisturbed so much of the complaint as set forth a cause of action for money damages against respondents.

Pursuant to the Federal Rules of Civil Procedure a deposition of respondent Sourwine was taken by petitioners. Subsequent to this, a deposition of Walter Dillon, Esq., one of the attorneys for the petitioners, was taken by the respondents. Both of these depositions are part of the files of the case. A portion of the deposition of respondent Sourwine is printed as part of the Joint Appendix in the Court below (36a, 37a). Immediately subsequent

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[8] Service was never effected in this action upon the Louisiana defendants. Similarly, service was not effected upon Eastland, as a defendant in the first action.

to the taking of these depositions, respondents moved to dismiss the complaint or, in the alternative for summary judgment (15a). Identical motions were made in the first action in the Federal District Court in Louisiana by the Louisiana state defendants. Affidavits were filed in both actions in support of the motion and in opposition.[9]

On March 12, 1964, the District of Columbia District Court, by Judge Sirica, granted the motion for summary judgment in respect to the cause of action for damages (17a). No opinion was filed. A notice of appeal was duly filed from the order granting summary judgment (17a). A subsequent order of the Court of Appeals consolidated the appeals from the first order dismissing the complaint insofar as it prayed for injunctive relief and the second order granting summary judgment on the cause of action for damages.

2. Proceedings in the Court of Appeals for the District of Columbia

The Court of Appeals in a *per curiam* opinion, in which Senior Circuit Judge Washington did not participate, affirmed the orders of the District Court. In respect to the dismissal of the request for injunctive relief the Court held that the relief sought was properly denied on the limited ground that an equitable decree against respondents Eastland and Sourwine restraining their use of the illegally

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[9] Subsequent to the filing of these affidavits but prior to the hearing on respondents' motion, petitioners filed affidavits of counsel seeking to invoke Rule 56, Subdivision (f) of the Federal Rules of Civil Procedure, which would permit the Court on a motion for summary judgment to grant a continuance "to permit affidavits to be obtained or depositions to be taken or discovery to be had" (30a-35a). These affidavits of counsel set forth certain questions of fact which were discovered after respondents' motion, which indicated the existence of additional serious and sharply disputed material issue of facts which would have required the denial of a motion for summary judgment.

seized material and requiring its return would not be effective since the materials were then in the possession of the Subcommittee itself.

In respect to the cause of action for money damages, the respondents had urged two positions in the Court of Appeals: (1) that petitioners failed to put forward a serious claim that respondents were parties to a knowing concert of action with the state officials, and (2) in any event the doctrine of legislative immunity insulated both respondents from suit. See opinion of court, Appendix A. The Court of Appeals, rejecting the first contention, pointed out that "were only the former involved we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial." However, the Court of Appeals based its affirmance solely upon an assumption that the doctrine of legislative immunity wholly insulates the respondents from this damage action, resting upon this Court's decisions in *Tenney* v. *Brandhove,* 341 US 367 (1951); *Barr* v. *Matteo,* 360 US 564 (1959); and *Wheeldin* v. *Wheeler,* 373 US 647 (1963).

3. Proceedings in the First Action in the Eastern District of Louisiana and the Court of Appeals for the Fifth Circuit

Simultaneous with the motion made in this action in the district court, the Louisiana state officials, defendants in the first action, made identical motions on identical grounds, before District Judge Ainsworth in the Eastern District of Louisiana. On March 18, 1964, Judge Ainsworth denied the motion of James Pfister, a member of the Louisiana legislature, and the Chairman of the Joint Legislative Committee for summary judgment in the cause of action for money damages. Pfister had urged, in identical terms as respondents here, that he was entitled to absolute legislative immunity under the doctrine of this Court in *Tenney* v. *Brandhove, supra.* Judge Ainsworth denied the

motion holding that "there is a sharp dispute as to the facts upon which we can conclude whether or not the defendant was engaged in permissible legislative activity on the dates he is alleged to have committed tortious acts against plaintiff". (This opinion is set forth in Appendix D.) Judge Ainsworth concluded that on the facts of this case, the opinion of the Court in *Tenney* did not require summary dismissal of the cause of action for money damages.[10]

In March, 1965, Chairman Pfister renewed his motions for summary judgment or for dismissal, and moved in the alternative for an order as authorized by 28 USC 1292(b) to appeal the District Court's denial of his motions to the Court of Appeals. On March 18, 1965, Judge Ainsworth, in a careful opinion, reaffirmed his refusal to grant the motions. The opinion, reproduced here as Appendix E, restates the conclusion of the District Court that the illegal acts charged against Chairman Pfister do not receive an automatic blanket immunity under this Court's decision in *Tenney,* and that the issue of whether these illegal acts are in fact within any protected orbit of legislative activity must be tried in court. However, in the interest of "judicial economy" Judge Ainsworth granted an order for an interlocutory appeal under 28 USC 1292(b) from his refusal to grant the motions for summary judgment in the money damages cause of action. The Court of Appeals for the Fifth Circuit thereafter dismissed Chairman Pfister's appeal. *Pfister* v. *Dombrowski,* Misc. #168, 1965, Court of Appeals for the Fifth Circuit (denying leave to take the interlocutory appeal). As a result, the cause of action for money damages in the first action against Chair-

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[10] In a companion opinion on the same day a similar motion for summary judgment made by another state official, Major Willie, was denied by Judge Ainsworth. A motion by the Superintendent of State Police Burbank for summary judgment was granted, not on immunity grounds, but for failure to present a sufficient case of connection with the conspiracy.

man Pfister and the other Louisiana officials will be tried in the Federal District Court for the Eastern District of Louisiana and is presently on the trial calendar.[11]

Accordingly the decisions of the Fifth Circuit and the Court of Appeals for the District of Columbia are in sharp conflict as to the applicability of the doctrine of legislative immunity to civil rights damage actions arising out of the context of events previously considered by this Court in *Dombrowski* v. *Pfister*. This conflict between the Circuits arises in great measure out of a difference in interpretation of the controlling decisions of this Court.

Reasons for Granting the Writ

This petition raises serious and substantial questions arising once again out of the factual complex which was the occasion of the Court's examination in *Dombrowski* v. *Pfister*, in the October 1964 Term, 380 US 479. And once again, as in the original case, questions arising out of petitioners' efforts to seek redress in the national courts for injury to their fundamental rights touch on issues of importance not only to the enforcement of laws protecting civil rights but to the very essentials of a judicial system constructed upon the premise that this is a government of law and not men.

1. The opinion of the Court of Appeals rests upon an extension of the doctrine of legislative immunity which is at war with the applicable decisions of this Court and with the first principles of a government predicated upon the assumption that no man no matter how high his position

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[11] Chairman Pfister also attempted to implead the other members of his Legislative Committee as third-party defendants. Judge Ainsworth dismissed Chairman Pfister's third-party complaint, and this dismissal is presently on appeal to the Fifth Circuit. *Pfister defendant, 3rd Party Plaintiff* v. *Arcenequx, 3rd Party Defendant*, #22,562, Court of Appeals for the Fifth Circuit.

stands wholly above the law. Cf. *Marbury* v. *Madison,* 1 Cranch 137, 163-168.

The lower court does not question the jurisdiction of the District Court to entertain the cause of action for money damages either under the Constitution, cf. *Bell* v. *Hood,* 327 US 678; *Wheeldin* v. *Wheeler,* 373 US 647; *Bock* v. *Perkins,* 139 US 628, or under Title 42 USC 1983 and 1985; *Monroe* v. *Pape,* 365 US 171; *Lee* v. *Hodges,* 321 F. 2d 480 (CA4, 1963); *Nesmith* v. *Alford,* 318 F. 2d 110 (LA 5, 1963); *Hughes* v. *Johnson,* 305 F. 2d 67 (CA9, 1962); *Cohen* v. *Norris,* 300 F. 2d 24 (CA9, 1962); *Basista* v. *Weir,* 340 F. 2d 74 (CA3, 1965); *Beauregard* v. *Wingard,* 230 F. Supp. 167 (D.C.S.D. Cal. 1964); *Bargainer* v. *Michal,* 233 F. Supp. 270 (D.C.N.D. Ohio, 1964). Nor does the lower court voice any hesitation as to whether the complaint adequately states a cause of action for money damages under the Civil Rights Act, cf. *Monroe* v. *Pape; Nesmith* v. *Alford; Lee* v. *Hodges; Hughes* v. *Johnson; Cohen* v. *Norris; Basista* v. *Weir; Beauregard* v. *Wingard; Bargainer* v. *Michal,* all *supra.* Cf. *Dombrowski* v. *Pfister, supra,* at p. 490.[12] Neither does the lower court seriously entertain any doubts as to the presence in the record of material disputed issues of fact as to respondents' participation in a knowing concert of action with the state officials requiring resolution by means of a trial. See opinion below, Appendix A.

Nevertheless, despite clear federal jurisdiction, an adequately pleaded cause of action, and genuine issues of fact in the record as to respondents' participation in a conspiracy under color of Louisiana state law to deprive petition-

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[12] It is significant in this respect that this Court specifically held in the first *Dombrowski* opinion that the allegations of that complaint "state a claim under the Civil Rights Act, 42 USC 1983" citing *Beauregard* v. *Wingard,* and *Bargainer* v. *Michal, supra.* The allegations of the present complaint for money damages under 1983 are, of course, identical in substance to the *Dombrowski* v. *Pfister* complaint, arising out of the same factual situation. See Statement of Facts, *supra.*

ers of federally protected rights, the lower court casts a mantle of total immunity over these respondents from any actions for damages under the Civil Rights Act. This stretches the immunity doctrine to unrecognizable contours and transforms a concept historically fashioned as a shield to protect the freedom of speech of legislators from the oppressive tyranny of an overbearing executive, cf. *United States* v. *Johnson,* #25, October Term, 1965, US , 86 S. Ct. 749 (1966), into a privileged sanctuary for men in high places to participate in and carry through activities in flagrant violation of the Constitution they are sworn to uphold. Such a distortion of the legislative immunity doctrine finds no support in the decisions of this Court from *Marbury* v. *Madison to United States* v. *Johnson* in the present Term.

2. The lower court reads the decisions of this Court as requiring the imposing of the shield of legislative immunity wherever a defendant utilizes his position as a legislator to further his violation of law. Thus the lower court brushes aside the allegations and evidence tending to show that the respondents had participated in a conspiracy with state officials to utilize state law to contrive false arrests and to engineer illegal raids by arguing that "this . . . ignores that the conduct of which appellants complain could not have been undertaken had appellees had no official legislative positions and responsibilities" Appendix A. But, this is the heart of the problem. A doctrine which immunizes the illegal acts of a legislator merely because the legislator uses his official position to accomplish the violation of law would sanction a governmental tyranny wholly destructive of the liberties of citizens. No greater danger to a free society exists than the concept that men in high places are immune to the prohibitions of the law merely because they hold these high positions. A policeman who beats a citizen or who seizes his property without a warrant is not immune from legal recourse by the citizen because the policeman wears his uniform and carries his

badge while he beats his victim or seizes his possessions. Cf. *Monroe* v. *Pape, supra.* Similarly a legislator who takes part in a conspiracy to carry out an illegal search and seizure in violation of the Fourth Amendment is not immune from a legal response merely because he takes advantage of his official position to further the illegal conspiracy. Cf. *United States* v. *Johnson, supra.*

This Court has carefully emphasized that the test of the appropriateness of legislative immunity is not the official status of the legislator but the nature of the acts he is called to account for. The lower court reads this Court's decision in *Tenney* v. *Brandhove,* 341 US 367 (1951), as a sanction for the broad cloak of immunity it cast over re-respondents' charged illegal activities. But *Tenney* rejected the limitless concept of legislative immunity the lower court invokes. Mr. Justice Frankfurter carefully pointed out that the doctrine is properly called into play only where "it appears that the defendants were acting in the sphere of legitimate legislative activity." *Tenney* v. *Brandhove,* at p. 376. Any legislative immunity, Justice Frankfurter insisted in *Tenney,* extends only to conduct within "the sphere of legitimate legislative activity." And Justice Frankfurter further reiterated that "this Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney* v. *Brandhove,* at p. 377. In applying this definition of legislative immunity to the facts before the Court in Tenney, Justice Frankfurter carefully confined the holding of the majority:

> "We conclude only that here the individual defendants and the Legislative Committee were acting in a field where legislators traditionally have power to act, and that the statute of 1871 does not create civil liability for such conduct." [*Tenney* v. *Brandhove,* at p. 379]

The concurring opinion of Mr. Justice Black, sharpened the definition of legislative immunity presented in the *Ten-*

ney majority opinion. Mr. Justice Black emphasized the outer boundaries of the doctrine:

> "The Court holds that the Civil Rights statutes were not intended to make legislators personally liable for damages to a witness injured by a committee exercising legislative power. This result is reached by reference to the long-standing and wise tradition that legislators are immune from legal responsibility for their intra-legislative statements and activities. The Court's opinion also points out that Kilbourn v. Thompson, 103 US 168, 28 L. Ed. 377, held legislative immunity to have some limits. And today's decision indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act. I substantially agree with the Court's reasoning and its conclusion."

The action of the lower court in immunizing the illegal conduct of respondents Eastland and Sourwine is in complete conflict with the principles delineated in both the *Tenney* majority and concurring opinions. The acts charged in the complaint, the conspiracy to utilize unconstitutional state laws to arrest petitioners without cause, to raid their offices and homes and seize their property in violation of the Fourth Amendment, all for the purpose of intimidating and deterring them and other citizens from exercising fundamental rights in order to achieve racial equality is hardly "legitimate legislative activity" on the part of legislators or their employees. Cf. *Tenney* at p. 376. Nor is a conspiracy to violate the federal rights of citizens "a field where legislators traditionally have power to act." Cf. *Tenney* at p. 379.

As Mr. Justice Black warned in his concurring opinion, the *Tenney* decision "indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in

a suit brought under the Civil Rights Act." This petition presents such a point. It is difficult to imagine any conduct which could more exceed "the bounds of legislative power." If *Tenney* could be read to immunize such conduct then the reservations of Mr. Justice Douglas in the dissenting opinion as to the majority formulations ought to be reconsidered and the entire doctrine reevaluated.

3. Only this Term this Court has warned against a distortion of the legislative immunity doctrine which would blur the distinction between legislative activity legitimately protected by the Speech or Debate Clause and unlawful conduct for which a legislator remains accountable in law. In *United States* v. *Johnson, supra,* the Court in reversing the conviction of a Congressman for violation of the conflict of interest statute and conspiracy to defraud the United States carefully pointed out that while reliance upon a speech made by the defendant on the floor of the House in the trial of the conspiracy count violated Article I, Section 6,[13] only the speech was immunized and not the charged unlawful conduct. Thus, Mr. Justice Harlan warned for the Court:

> "No argument is made, nor do we think that it could be successfully contended, the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." 86 S. Ct. at 751.[14]

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[13] "For any Speech or Debate in either House, they shall not be questioned in any other place."

[14] It is revealing in this respect that the Court in *Johnson* did not dismiss the indictments against the Congressman but remanded for new trials on both the conspiracy and substantive counts purged of reliance upon the speech delivered on the floor of the House. The Chief Justice and Justices Douglas and Brennan would have affirmed the substantive counts for violation of the conflict of interest statute without remanding these counts for a new trial.

The teaching of *United States* v. *Johnson* is directly applicable here. The Speech or Debate Clause does not reach conduct such as was involved in the conspiracy to utilize the overbroad anti-subversive laws of Louisiana to obtain the illegal arrest of the petitioner and provide a pretext for raids and seizures violative of the Fourth Amendment. This is conduct no less heinous than an "attempt to influence the Department of Justice" and no less prohibited by applicable federal statutes.[15] And as in *Johnson* it is conduct "that is in no wise related to the due functioning of the legislative process." 86 S. Ct. at p. 751. The decision of the lower court is in sharp conflict with this Court's recent decision in Johnson and ought to be reviewed and reversed.

4. In *Johnson* the Court had the occasion to probe the historical roots of the Speech or Debate Clause. As Mr. Justice Harlan carefully points out:

> "There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause." 86 S. Ct. at 755-6.

The matrix out of which the American legislative privilege was fashioned was the determination to protect the absolute freedom of speech of representatives of the people from "intimidation by the executive and accountability before a possibly hostile judiciary." 86 S. Ct. at 755. Thus in *Kilbourn* v. *Thompson*, 103 US 168, the first discussion in this Court of the dimensions of the legislative privilege, the Court, mindful of this purpose, read the Clause broadly to include not only "words spoken in debate," but any-

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[15] Cf. 18 USC 241, 242. See *United States* v. *Price*, US , 86 S. Ct. 1152; *United States* v. *Guest*, US , 86 S. Ct. 1170 (1966).

thing "generally done in a session of the House by one of its members in relation to the business before it." 103 US at p. 204. But it would be ironic indeed if a privilege of immunity designed to protect the free speech of legislators were to be turned into an instrument for the destruction of the free speech of citizens. Yet this will be the inevitable result unless a tendency of inferior federal courts reflected in the decision below to read the opinions of this Court as sanctioning a limitless immunity is not checked.

The underlying constitutional concern with "the central importance to our political system of uninhibited political expression as guaranteed to the general populace by the First and Fourteenth Amendments," *United States* v. *Johnson, supra*, footnote 12, has at least as important a place in the constitutional spectrum as the insistence upon the "independence and integrity of the legislature." *United States* v. *Johnson, supra.* Indeed the Court in *Johnson* recognizes that these two objectives are deeply interrelated. See Footnote 12. This case presents to the Court the necessity for accommodating one fundamental constitutional value—"the central importance . . . of uninhibited political expression [by] the general populace" with another fundamental constitutional value—"the independence and integrity of the legislature." This adjustment of separate but interrelated values can be accomplished through a repudiation of the formless and automatic immunity concept applied by the lower court and an insistence that the limitations upon the doctrine, implicit in *Kilbourn* and made explicit in *Tenney,* will be rigorously enforced, particularly where the illegal activities of the legislator trenches upon the rights of citizens to "uninhibited political expression." *United States* v. *Johnson, supra.*

When Mr. Justice Miller first discussed the Speech or Debate Clause in this Court in *Kilbourn* he found it important to state the limitations upon the privilege being then

enunciated which the Court might one day have to face. Thus in sustaining the privilege as to a resolution offered on the floor of the House he pointedly stated: "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible." Again in *Tenney,* in joining the majority, Mr. Justice Black warned of a point at which a legislator's conduct "so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act."

When a legislator conspires with officials of a state to utilize state laws to harass citizens with false arrests and illegal raids and seizures in order to frighten and deter these citizens from exercising the rights of speech, press and assembly in their efforts to implement the constitutional promise of racial equality, the moment Mr. Justice Miller warned of in *Kilbourn* has come. This is conduct "of an extraordinary character for which the members who take part in the act may be held legally responsible." A proper deference to the paramount constitutional objective of "uninhibited political expression as guaranteed to the general populace," *United States* v. *Johnson, supra,* requires that the limitations to the legislative immunity doctrine reiterated by the Court from *Kilbourn* to *Johnson* be rigorously enforced particularly where, as here, in violation of federal law, the acts of the legislator in question interfere with and deter that "uninhibited political expression" "of certain importance to our political system." *United States* v. *Johnson,* (opinion of Mr. Justice Harlan).

5. The opinion of the lower court is in sharp conflict with the recent decision of this Court in *Wheeldin* v. *Wheeler,* 373 US 656 (1963). *Wheeldin* involved an action for damages for injuries caused to the petitioner by the service of a subpoena upon him by the respondent, an investigator for the House Committee on Un-American Activ-

ities. The complaint alleged that the subpoena was signed in blank by the Chairman of the Committee and was unauthorized by the full Committee. The Court of Appeals for the Ninth Circuit invoked the immunity doctrine and dismissed the damage cause of action, 302 F. 2d 36, relying upon this Court's decision in *Barr* v. *Matteo,* 360 US 564.

In this Court both the majority opinion of Mr. Justice Douglas, 373 US 647, and the dissenting opinion of Mr. Justice Brennan, joined in by the Chief Justice, and Mr. Justice Black, 373 US at p. 653, reject any reliance upon an immunity concept in respect to the *Wheeldin* cause of action for damages.

Mr. Justice Douglas, for the majority, disposes of the immunity claim summarily by recording the fact that before the Court "the Solicitor-General has conceded, under the allegations respondent Wheeler was not acting sufficiently within the scope of his authority to bring the doctrine into play." 373 US at p. 647.

And the dissenting Justices likewise brush aside the blanket invocation of immunity with this analysis of the lower court's opinion:

> "It sustained the District Court's dismissal on the sole ground that the allegedly unlawful acts had been committed by respondent in the line of his duty as a federal officer, and that therefore he was immune from suit by reason of the principles announced in *Barr* v. *Matteo,* 360 U. S. 564. In this Court, the Solicitor General of the United States, appearing as counsel for the respondent, candidly admits that the Court of Appeals misapplied *Barr* v. *Matteo.* In that case we upheld the governmental-officer immunity in respect of 'action . . . taken . . . within the outer perimeter of petitioner's line of duty.' 360 U.S., at 575. It has never been suggested that the immunity reaches beyond that perimeter, so as to shield a federal officer acting wholly on his own. A federal officer remains liable

> *Kozlowski* v. *Ferrara,* 117 F. Supp. 650; Note, Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 835 (1957). Liberally construed, see *Virgin Islands Corp.* v. *W. A. Taylor & Co.,* 202 F. 2d 61; 2 Moore, Federal Practice (2d ed. 1948), ¶12.08, at 2245, petitioner Dawson's complaint alleges no less."

The concession of the Solicitor General in *Wheeldin* that the respondent there was not "acting sufficiently within the scope of his authority to bring the [immunity] doctrine into play" applies with particular force to the present petition. Here, as in *Wheeldin,* the only conceivable colorable authority for respondents' participation in the illegal acts charged was the utilization on October 4th and 5th, 1963, of subpoenas purportedly issued on the authority of a Congressional Committee. See Statement of Facts, *supra.* But here, exactly as in *Wheeldin,* the subpoenas were signed in blank by the Chairman; compare 373 US at p. 648 with Statement of Facts, *supra,* at p. 8, and were filled out by the subordinate official; compare 373 US at p. 648 with Statement of Facts, *supra,* at p. 8, and were issued without the authorization or knowledge of the Congressional Committee involved;[16] compare 373

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[16] While the respondents sought to "cure" the obvious lack of authorization for the subpoenas by a subsequent resolution on November 14, 1963 "receiving" the seized material and providing for its photostating and inclusion in the "permanent records" of the Subcommittee, see opinion below, Appendix A, at p. 3a, considerable additional serious doubt was cast upon the existence of any Subcommittee authorization for the actions of the respondents by a letter from Senator Kenneth B. Keating, a member of the Subcommittee, to respondent Eastland. The letter read as follows:

January 30, 1964

Honorable James O. Eastland
Chairman
Senate Judiciary Committee
Washington 23, D. C.

Dear Mr. Chairman:

I understand that the records of the Southern Conference Educational Fund, Inc., were subpoenaed October 5 at your direction.

US at p. 648, with Statement of Facts, *supra*, at p. 8. If respondent Wheeler was not "acting sufficiently within the

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I understand further that they were transferred to Mississippi October 27, two days after a request by officials of the SCEF in the Louisiana Criminal District Court for a permanent injunction to bar removal of these records from the area.

I further understand that on November 14 some members of the Internal Security Subcommittee approved a resolution to incorporate portions of this material by reference into the hearing record and to photostat it in full before returning it. That resolution was not brought to my attention until my staff specifically inquired January 27.

I would therefore like to take this occasion to express my deep concern over the action taken. First, I question what federal legislative purpose is served by the subpoenaing of material already under review by a committee of a state legislature. Secondly, I am very much opposed to the subpoena of any records that are material to pending litigation in a state court. This strikes me as a startling violation of states' as well as individual rights.

Thirdly, I am disturbed that, although a member of the subcommittee which has, in effect, ratified this action, I was not informed of this action or given any opportunity to express my dissent.

Regardless of the nature of the group involved in this case, I believe the action taken by the subcommittee is most unfortunate and I strongly urge that no further actions be undertaken by the committee along these or similar lines without full discussion by the entire subcommittee.

Very sincerely yours,

KENNETH B. KEATING

(Exhibit A to affidavit of counsel in opposition to motion for summary judgment) (32a, 33a).

On the basis of this letter petitioners moved pursuant to Rule 56, subdivision (f) of the Federal Rules of Civil Procedure for "a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had." This motion was denied by the District Court.

scope of his authority to bring the doctrine into play'' neither were the respondents here.[17]

But *Wheeldin* applies with even greater force to this cause of action for damages under the Civil Rights Act. The majority opinion, after disposing of the immunity question, and asserting the existence of federal jurisdiction, 373 US at p. 649, found that the ''facts alleged do not establish a violation of the Fourth Amendment'', 373 US at p. 650. Absent other considerations not here germane [18] it is perfectly clear that had the complaint adequately alleged a Fourth Amendment violation the majority of the Court would have sustained the complaint.[19]

This petition, unlike the complaint in *Wheeldin* brings before the Court a classic Fourth Amendment cause of action. And here, it is not necessary to rest upon the

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[17] It is significant in this connection that the Court of Appeals for the District of Columbia in *Shelton* v. *United States,* 327 F. 2d 601 (1963) has only recently held that subpoenas of the same Subcommittee here involved, the Internal Security Subcommittee, are illegal, void and unauthorized when they are issued by one member of the Committee, even if he is Chairman, without the prior authorization and approval of the Subcommittee. Respondent Sourwine testified on deposition in this case as follows:

"Q. Did the Committee or Subcommittee authorize the submission of the subpoenas? A. No."

[18] The majority opinion also holds that the Civil Rights Acts were not applicable in *Wheeldin* since under 42 USC 1983, the respondent there was not acting under color of state law, and no conspiracy was charged invoking 42 USC 1985. Neither of these questions is relevant here since this complaint both charges a conspiracy under 1985 and also charges respondents with acting together with state officials under color of the laws of the state of Louisiana. A cause of action under 1983 and 1985 is clearly stated. See *Monroe* v. *Pape, Nesmith* v. *Alford, Lee* v. *Hodges,* all *supra.* Cf. *United States* v. *Price, supra.*

[19] The dissenting judges, Mr. Justice Brennan, the Chief Justice, and Mr. Justice Black, would have sustained a cause of action in tort even without the Fourth Amendment allegations.

allegations of the complaint alone. The state courts of Louisiana have already held that the arrests were illegal and that the raids and seizures violated the Constitution. See Statement of Facts, *supra*. The material seized was ordered suppressed as evidence by the state courts and this Court itself ordered the immediate return of all papers and documents seized. *Dombrowski* v. *Pfister,* 380 US at p. 498.

The only remaining question under *Wheeldin* would be whether the complaint and record adequately showed respondents' relation to the Fourth Amendment violations sufficient to require a trial of the action. And as to this, the lower court has already held that absent considerations of immunity it would "have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial". Appendix A *infra*. The conclusion is inescapable that under both the majority and dissenting opinions in *Wheeldin* the decision of the lower court ought to be reversed and the respondents should be required to stand trial on the serious charges set forth in the complaint.

6. This petition brings to the Court a clear conflict between the Circuits which ought to be resolved. The conflict presented which urgently requires the intervention of this Court reflects not only fundamental differences in the interpretation of the doctrine of legislative immunity but wholly contradictory results in the application of the doctrine to the same factual record. Upon precisely the same complaint and essentially the same record [20] the Fifth Circuit and the District of Columbia Circuit have come to diametrically opposite conclusions. While the District of Columbia Circuit has apparently concluded that a broad mantle of legislative

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[20] The record in the first action, brought in the Eastern District of Louisiana, contained in addition depositions taken of Chairman Pfister. Petitioners here sought permission to introduce this deposition in the Washington action but the District Court denied a motion under Rule 56(f) for time to file the deposition (31a to 35a).

immunity protects respondents Eastland and Sourwine from the normal processes of law, the Fifth Circuit has concluded that Chairman Pfister of the Louisiana Joint Legislative Committee must stand trial together with the other Louisiana state officers charged to be conspirators and participants in the violation of petitioners' constitutional rights. See Statement of Facts, *supra.*

In a series of opinions, (Appendices D and E), District Judge Ainsworth considered the precise questions raised by these respondents in the District of Columbia, and concluded that since "there is a sharp dispute as to the facts upon which we can conclude whether or not the defendant was engaged in permissible legislative activity" a motion for summary judgment or dismissal must be denied and the defendant must be required to stand trial. Out of a concern for "judicial economy" Judge Ainsworth certified the question for an interlocutory appeal. The Court of Appeals for the Fifth Circuit thereafter dismissed the appeal sustaining the conclusion of the District Court that the Louisiana legislators involved in the charged conspiracy to violate petitioners' constitutional rights must stand trial in a Louisiana Federal Court. *Pfister* v. *Burbank,* Misc. #168, Court of Appeals, Fifth Circuit, 1965.

This presents a sharp and irreconcilable conflict between the Circuits which will result not only in a total disparity of judicial relief in the present case but in continued conflict and confusion in the application of the doctrine of legislative immunity in an area of growing national concern in the enforcement of the Civil Rights Acts. This apparent conflict between the Circuits ought to be resolved by this Court.

7. Regardless of the disposition of the legislative immunity question as to respondent Eastland, the extension of the doctrine by the lower court to immunize the actions of respondent Sourwine was unjustifiable and in clear conflict with controlling decisions of this Court.

Respondent Sourwine is the counsel for the Internal Security Subcommittee. He is not a member of Congress. The constitutional protection of the Speech or Debate Clause does not extend to him. The precise question was settled by this Court in *Kilbourn* v. *Thompson, supra.* In *Kilbourn,* the action was for damages for false imprisonment. The defendants were several members of the House of Representatives and one John A. Thompson, Sergeant-at-Arms of the House. In upholding the immunity cast by the Speech or Debate Clause over the members of the House, the Court specifically and clearly refused to extend the immunity to the Sergeant-at-Arms, and directed that the judgment of dismissal must be reversed as to him and the case remanded for further proceedings. Thus the Court concludes in Kilbourn:

> "... we think the plea set up by those of the defendants who were members of the House is a good defense, and the judgment of the court overruling the demurrer to it and giving judgment for those defendants will be affirmed. As to Thompson, the judgment will be reversed and the case remanded for further proceedings."

103 US at p. 205.[21] The lower court's extension of the legislative immunity doctrine to immunize the wrongful acts of respondent Sourwine was in complete conflict with the direct holding of this Court in *Kilbourn* and should be reviewed and reversed.[22]

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[21] The plaintiff later recovered a money judgment for $20,000 against Thompson, the Sergeant-at-Arms. See Goldfarb, *The Contempt Power,* (Col. Univ. Press 1963) p. 34.

[22] The vitality of the *Kilbourn* insistence that the legislative immunity doctrine applies only to members of a legislature is evidenced in the Court's reaffirmation of this limitation in *Tenney* v. *Brandhove, supra.* Mr. Justice Frankfurter wrote for the majority: "It should be noted that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege. In *Kilbourn* v. *Thompson, supra,* this Court allowed a judgment against the Sergeant-at-Arms, but found that one could not be entered against the defendant members of the House."

The lower court appears to concede that under *Kilbourn* no immunity extends to respondent Sourwine, but suggests that the *Kilbourn* holding has in some way been modified by this Court's decision in *Barr* v. *Matteo,* 360 US 564. This, however, was precisely the position urged in *Wheeldin* and repudiated by the Court. Mr. Justice Douglas' comments in the majority opinion are that "there is much discussion in the briefs of *Barr* v. *Matteo,* 360 US 564", and then points out "But that was a libel action brought against a federal official in the District of Columbia", 373 US at 650. *Barr,* as Justice Douglas indicates, reflects a judicially developed law of privilege relating to officers of the Executive Branch of government, while questions of legislative privilege are constitutional in nature deriving their authority from Article I, Section 6. See *Barr* v. *Matteo,* opinion of Mr. Justice Harlan at p. 569.

The considerations which led the majority of the Court in *Barr* v. *Matteo* to extend the executive privilege to the Acting Director of the Office of Rent Stabilization are not applicable in the area of legislative activity. The policy considerations underlying the decision of the sharply divided Court in *Barr* v. *Matteo* to so extend the executive immunity reflected a concern with "the effective functioning of government" in a period of "complexities and magnitude of governmental activity". 360 US at p. 564. The policy considerations underlying the Speech or Debate Clause are very different. They reflect, as the Court discusses in *United States* v. *Johnson, supra,* the necessity for protecting the free speech and independence of legislators. These principles are not primarily involved when employees of a legislature such as the Sergeant-at-Arms of the House, as in *Kilbourn,* or the counsel to a Senate Committee, as here, are held accountable at law for otherwise wrongful acts.

Moreover, even if *Barr* v. *Matteo* were extended to cover legislative employees, and further extension of its doctrine would raise serious policy questions, see the dissenting

opinions of the Chief Justice and Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Stewart, 360 US at pps. 579, 586 and 592, it could not be read so as to impose any immunity upon the charged acts of respondent Sourwine. Sourwine is charged with participation in a conspiracy under color of Louisiana laws to contrive false arrests and to carry through illegal raids and seizures for the purpose of interfering with the protected rights of citizens. His claim to colorable authority resulting in immunity lies in his use of subpoenas signed in blank by respondent Eastland, unauthorized by the Committee itself. See Statement of Facts, *supra,* and point 5 *supra,* Reasons for Granting the Writ. As in *Wheeldin* v. *Wheeler,* the doctrines of *Barr* v. *Matteo* have no applicability here. Sourwine, as Wheeler, "was not acting sufficiently within the scope of his authority to bring the doctrine into play". *Wheeldin* v. *Wheeler,* opinion of Mr. Justice Douglas, 373 US at p. 647.

The concurring opinion of Mr. Justice Black in *Barr* v. *Matteo,* without which there would not have been a Court, is most instructive in this respect. Mr. Justice Black joined the Court on the assumption that the activity of the government official complained of was "neither unauthorized nor plainly beyond the scope of Mr. Barr's official business but instead related more or less to general matters committed by law to his control and supervision." 360 US at pps. 577 and 578.

The activity of respondent Sourwine was "unauthorized" by the Committee. See point 5 *supra;* cf. *Shelton* v. *United States, supra.* And it is certainly clear that participating in the planning of illegal arrests, raids, and seizures in violation of the Constitution was "plainly beyond the scope" of Mr. Sourwine's "official business".[23]

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[23] It must be stressed here that the lower court has found that as to the question of whether respondents Sourwine and Eastland "were parties to a knowing concert of action with the state officials" it "would have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial." Appendix A, *infra.*

Under the definitions of the concurring opinion in *Barr,* no immunity attaches to the charged activities of respondent Sourwine.

8. If, on the other hand, *Barr* v. *Matteo* could be read as sanctioning the immunizing of respondent Sourwine's conduct in this case, that decision ought to be reconsidered. In his dissenting opinion in *Barr,* joined in by Mr. Justice Douglas, the Chief Justice pointed out that the extension of an absolute privilege of immunity to the government official there involved "can only have the added effect of deterring the desirable public discussion of all aspects of our Government and the conduct of its officials". 360 US at p. 585. The effect of such an extension of the immunity doctrine, the Chief Justice concluded, would be to "sanctify the powerful and silence debate". 360 US at p. 585. The Chief Justice's warning is even more relevant in the circumstances of the present case. Extension of a doctrine of immunity to employees of congressional committees investigating political opinions and associations of citizens would be to encourage lawless and arbitrary action in a field in which considerable concern has already been expressed as to the impact of legislative investigative activity upon the sensitive area of First Amendment liberties. See *Watkins* v. *United States,* 354 US 178; *DiGregory* v. *New Hampshire,* — US —, 86 S. Ct. 1148, #396 this Term; Cf. *Gojack* v. *United States,* cert. granted, 382 US 937, #594 this Term. As in *Barr,* "this is a much more serious danger than the possibility that a government official might occasionally be called upon to defend his actions and to respond in damages". *Barr* v. *Matteo,* 360 US at 585. Furthermore, the caution raised by Mr. Justice Brennan in his dissenting opinion in *Barr* is most appropriate here. The Justice warned that "the courts should be wary of any argument based on the fear that subjecting government officers to the nuisance of litigation and the uncertainties of its outcome may put an undue burden on the conduct of the public business". 360 US at pps. 588

and 589. Requiring the respondent to stand trial on the charges of conspiring to contrive false arrests and illegal raids and seizures no more places an "undue burden on the conduct of the public business" than does requiring the defendant in *United States* v. *Johnson* to stand trial for charges of conspiring to defraud the United States. As the dissenting Justices in *Barr* conclude, the public interest is far greater served by permitting citizens recourse to legal remedies for wrongs committed upon them by government officials than by immunizing the wrongful conduct out of a perhaps unfounded concern that litigation may impede the proper functioning of government. See Mr. Justice Brennan's opinion in *Barr* v. *Matteo,* 360 US at p. 589.

9. The district court dismissed the cause of action for equitable relief, without a hearing on the allegations, treating the action as a request for injunctive relief against a Committee of the Senate. Invoking the principle of "separation of powers" the district court stated that "this Court may not enjoin a Congressional Committee from pursuing its activities", Appendix B, *supra,* and dismissed the complaint for want of jurisdiction.

The Court of Appeals properly disregarded this contention pointing out that the complaint did not seek to enjoin the Senate Committee in any respect, but that the relief sought was directed solely against the individual respondents. As the Court of Appeals conceded the complaint did not seek injunctive relief against the functioning of a Congressional Committee. The gravamen of the cause of action, insofar as it affected respondents Eastland and Sourwine, was the charge that these individuals, together with other individuals, participated in a plan of conspiracy to utilize the laws of the State of Louisiana to deprive the appellants of rights, privileges and immunities secured to them by federal law. *Cf. Monroe* v. *Pape, supra,* see Title 42 U.S.C. 1983, 1985.

The complaint further charged that these individuals "without warranty or authority of law" pursuant to the conspiracy "secretly and surreptitiously" were in possession of certain books, records and other documents which had been seized in the illegal raids of October 4th conducted under color of laws of the State of Louisiana (see Complaint, paragraph 22 (7a)).

The complaint went on to charge that "in order to evade the jurisdiction" of the United States District Court for the Eastern District of Louisiana, the respondents transferred certain of these documents and records to the District of Columbia and that these "are presently in the possession of defendants Eastland and Sourwine in the District of Columbia". Other documents and records belonging to petitioners were "also secretly and surreptitiously transferred to a State Court House in the State of Mississippi and are presently in the possession of defendant Eastland" (Complaint, Paragraph 22 (7a)).

The complaint nowhere charged that the illegally seized records or documents were in the custody or possession of the Senate Committee. It charged solely that they were illegally and without "warrant of law" in the possession of the individual respondents, Sourwine and Eastland, who had obtained them pursuant to a conspiracy to utilize Louisiana state laws to violate appellants' federally protected rights.

This complaint clearly states a cause of action for equitable relief under the Civil Rights Act. *Hague* v. *CIO,* 307 U.S. 496; *Bush* v. *New Orleans Parish School Board,* 188 F. Supp. 916, aff'd 365 U.S. 569; *Jordan* v. *Hucheson,* 323 F. 2d 597 (C.A. 4, 1963), and cases cited *supra.* The conspiracy charged is one to utilize state laws to interfere with federally protected rights. The doctrine of separation of powers has no relevance here. The complaint charges that respondents, together with legislative and executive officials of the state, conspired to use state law to conduct

the illegal raids. The fact that they are "legislative" officers, has no impact upon the power of a federal court to grant equitable relief.

As far as the complaint was concerned, and that was all that was properly before Judge Holtzoff on the motion to dismiss, *Clark, Attorney General* v. *Vebersee Firanz Korporation,* 332 US 480, injunctive relief was sought to restrain these respondents who had participated in a conspiracy under color of state law, from using or disposing of the fruits of the illegal searches and seizures. There was no allegation whatsoever that the illegally seized material was in the possession of the Senate Committee, nor was any injunctive relief sought against the Committee. As a matter of fact, the complaint alleged that a good portion of the illegally seized material was then sitting in the private possession of respondent Eastland in a state courthouse in the State of Mississippi (7a).[24]

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[24] Paragraph 22 of the Complaint states:

"22. In further pursuance of this conspiracy defendants Burbank, Willie and Pfister, at the request of defendants Eastland and Sourwine secretly and surreptitiously, without warrant or authority of law, transferred a portion of said books, records, documents and other articles belonging to the plaintiffs out of the jurisdiction of the United States District Court for the Eastern District of Louisiana. Plaintiffs had instituted in that Court a proceeding under appropriate federal statutes to obtain the return of said documents and articles, and to receive appropriate redress under the law for the illegal acts of the defendant conspirators. In order to evade the jurisdiction of that Court, the defendants caused to be transferred a portion of the said documents, records and other articles to the District of Columbia. Upon information and belief said documents, articles and records are presently in the possession of defendants Eastland and Sourwine in the District of Columbia. Other documents and records, all belonging to the plaintiffs, illegally and in violation of the Constitution of the United States seized from them, were also secretly and surreptitiously transferred to a State Court House in the State of Mississippi, and are presently in the possession of defendant Eastland."

The Court of Appeals does not rest its affirmance upon the jurisdictional grounds invoked by the District Court. Instead it bases its sanction of the dismissal of the equitable cause of action purely upon its conclusion that the equitable relief sought against the individual respondents would not be effective since other "members of the Subcommittee would still have unfettered use of the documents". Appendix A, *infra*. [25] This portion of the opinion of the lower court is based upon an assumption that although the complaint probably adequately states a cause of action for equitable relief against the individual respondents,[26] it should be dismissed because the relief sought, although otherwise valid, may have been frustrated by subsequent actions of the respondents in turning the seized documents over to the Senate Committee. That this assumption was wholly unwarranted is apparent in light of the record before the district court at the time of dismissal. The fact that the seized materials, first removed at midnight on the evening before a federal court hearing, out of the

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[25] The lower court relied upon this Court's statement in *Virginia Ry.* v. *System Federation No. 40,* 300 US 515, 550 (1937), that "A court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of no benefit to the plaintiff." What the lower court did not mention was that in *Virginia Ry.*, this Court *upheld* the granting of equity relief pointing out that "whether the decree will prove so useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case rather than to general rules which at most are but guides to the exercise of discretion" 300 US at p. 551. It is perfectly clear that under *Virginia Ry.* this "exercise of discretion" can be engaged in only after a hearing on the facts of "the special circumstances of each case" 300 US at p. 551.

[26] It would be difficult indeed to hold that the complaint did not state a cause of action for equitable relief against the individual respondents in view of this Court's holding in *Dombrowski* that the allegations there stated a cause of action under Title 42 USC 1983. 380 US at p. 490.

reach of the jurisdiction of the federal court, see Statement of Facts, *supra,* then deposited in the sanctuary of a Mississippi chancery clerk's office safe from the process of the Eastern District of Louisiana, see Statement of Facts, *supra,* were now in the Washington offices of the Internal Security Subcommittee of the Senate, was hardly a reason to assume that an injunction permanently restraining the individual respondents from using the fruits of the illegal raids and seizures would be "of no benefit to the plaintiffs". Cf. opinion of lower court, Appendix A, *infra.*

At a minimum, petitioners were entitled to a hearing on their complaint at which time the respondents' defense of futility to the plea for equitable relief could have been tested. See *Virginia Ry.* v. *System Federation, supra.* Among the many issues petitioners were entitled to litigate would have been the highly pertinent question as to whether the individual respondents retained copies of the seized documents, particularly the membership lists illegally taken, and whether they had given these copies to other individuals throughout the country. At this moment petitioners can only speculate as to where these copies, admittedly made by respondents, are now located.[27]

To sanction the dismissal of the equity provisions of the complaint on the ground that the actions of the respondents had in effect frustrated any possibility of legal

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[27] This Court is well aware of the use sought to be made of membership lists of civil rights organizations in certain areas of the Southern states. Cf. *NAACP* v. *Alabama; NAACP* v. *Flowers; Louisiana* v. *NAACP,* all *supra.* Since the decision of the Court in *NAACP* v. *Alabama* it has become increasingly clear that enforced production of membership lists of civil rights organizations active in the Southern states itself violates the Constitution. The Complaint charges that a central purpose of the conspiracy was to utilize the Louisiana laws as a pretext for the staging of raids during which the membership lists could be seized—lists not otherwise obtainable to the Southern authorities through lawful legislative process, state or national.

relief, would be to lend judicial approval to the extraordinary course of events set off by the October raids. The Louisiana state court could not order the return of the seized materials when it quashed the original arrest warrants because it was told by the state participants in the conspiracy that the seized materials were technically not in their hands but under the control of the respondents. The Louisiana federal court to which the petitioners then turned for relief could not order the materials returned because they were spirited out of its jurisdiction by these respondents the night before the hearing on a temporary restraining order, into the sanctuary of a Missisippi Chancery Clerk's office, safely across the Louisiana border. And when federal process finally caught up with the respondents in the District of Columbia in the form of this action, petitioners were faced with the final frustration of any legal recourse—the conclusion of the lower court that petitioners were too late since respondents had safely deposited the illegally obtained material in hands supposedly beyond the reach of the law.[28]

The peremptory dismissal of the equitable cause of action not merely legitimates a course of conduct designed to frustrate any effort to invoke the processes of law, state and federal, to protect these petitioners from the harmful effect of raids and seizures both the Louisiana Courts and this Court have condemned as unlawful. It frustrates the mandate and decree of this Court. In *Dombrowski,* the Court ordered the District Court to frame a decree providing for the immediate return of all papers and documents seized. The reinstatement of the equitable cause of action in this case would permit the enforcement of the decree of this Court in respect to these individual respondents since, by their own admissions, copies of all

[28] The entire story of this unsuccessful legal pursuit of the illegally seized materials is set forth in the Statement of Facts and the record of the case.

seized materials have been retained. (Affidavit of respondent Sourwine (46, 47a).

10. This petition has brought before the Court a series of questions which touch the fundamentals of a free society. In essence they raise the issue as to whether any man by virtue of his power, his status, or his authority, is wholly above the law.

In this case a United States Senator, together with his assistant, is charged with participating in a conspiracy together with officials of the State of Louisiana to use laws of the state to procure the false arrest of citizens, to arrange for illegal raids and seizure of their property, for the purpose of intimidating and frightening them and other citizens from exercising the rights of speech, press and assembly to bring about the elimination of racial segregation and discrimination. The laws of the United States provide for remedies against such conduct. The Civil Rights Acts were designed for this very purpose. This Court must now decide whether the remedies the Congress has provided will be denied to these petitioners because the participants in the conspiracy to bring about results this Court has already condemned in *Dombrowski* v. *Pfister* include men whose status places them above the law. In *Marbury* v. *Madison* this Court said, in the first days of the Republic, that "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right".

In reviewing the opinions below and reversing the judgments, this Court would be reaffirming these words.

CONCLUSION

The petition for the writ of certiorari should be granted, and the judgments below reversed.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,435

No. 18,544

JAMES A. DOMBROWSKI, *et al.*,

Appellants,

v.

COLONEL THOMAS D. BURBANK, *et al.*,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PER CURIAM: The appellants in this case are a Louisiana civil rights organization and its executive director. Their complaint in the District Court sought injunctive relief and damages under 42 U. S. C. §§ 1983 and 1985. The first of these appeals, No. 18,435, is from an order dismissing the claim for injunctive relief. The second, No. 18,544, is from the grant of appellees'[1] motion for summary judgment on the claim for damages.

The complaint alleged in substance that various Louisiana officials, in league with appellees, illegally

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[1] Although the complaint named a number of defendants, most of these appear to be residents of Louisiana upon whom service of process was not effected. Appellees are the only two defendants who were served; and they are, respectively, the Chairman and the Chief Counsel of the United States Senate Internal Security Subcommittee.

searched the offices of appellants and seized documents and records.[2] These papers, while in the possession of the Louisiana officials, were subjected to a subpoena issued in the name of the United States Senate Internal Security Subcommittee. Compliance with this subpoena resulted in the transfer of the seized papers to the custody of the Senate Subcommittee which, in plenary session, made provision for their handling by the resolution set forth in the margin.[3] Appellants, asserting that the subpoena was

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[2] A detailed description of this action is contained in *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). The Supreme Court in that case, decided while the instant appeals were under submission, invalidated the Louisiana statute under which the Louisiana officials purported to act, and directed that the relief to be afforded by the District Court in Louisiana should include "ordering immediate return of all papers and documents seized."

[3] The full entry in the Subcommittee's minutes is as follows:

November 14, 1963

Upon the conclusions of the testimony of the second of two witnesses heard in executive session, the Subcommittee considered and discussed the handling of material subpoenaed from the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

Present: Senators Eastland, Dodd, Hruska, Dirksen, and Scott.

After discussion, and on motion of Senator Dirksen, it was ORDERED that the Chairman be authorized to appoint a Task Force consisting of Senators Eastland, Johnson, Dodd, Hruska and Scott to evaluate the subpoenaed material progressively with respect to its value to the Subcommittee's investigation and to make determination from time to time respecting particular papers, documents, or other material to be inserted verbatim in the record of the Subcommittee; that all of the material not clearly irrelevant to the Subcommittee's investigation of Communist activity generally, of Communist front activity, of Communist infiltration of organizations and groups, and/or the source of funds for Communist, or Communist front activities be ordered into the Committee's hearing record by reference subject to the later determination of the Task Force respecting particular items which should be entered into the record verbatim; and that all of the original records obtained under the subpoena be photostated for the permanent records of the Subcommittee and, when so photostated, be returned promptly to the posses-

deficient in authority from the Subcommittee, seek damages, as well as an injunction requiring appellees to return their records and to refrain from using them.

No. 18,435

Appellants' complaint alleged that the seized materials were in the possession of appellees. However, the affidavits submitted in opposition to appellants' motion for a preliminary injunction revealed that the Senate Subcommittee had incorporated the documents in its hearing record and made express provision for their examination and disposition by the collective act of the Subcommittee. See note 3 *supra*.

Since the seized materials must thus be regarded as in the possession of the Senate Subcommittee,[4] a judicial command addressed solely to appellees—one member of the Subcommittee and one of its staff—cannot be assured of effect. The test, set forth by the Supreme Court in

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sion of the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

James O. Eastland, Chairman

I consent and agree to the foregoing procedure.

John F. McClellan
Olin D. Johnston
Roman L. Hruska

[4] Appellants contend that the trial court, in dismissing the prayer for injunctive relief, should have limited its consideration to the allegations of the complaint. Reliance is placed upon *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485 (1900), for the proposition that all of the allegations of the complaint must be regarded as true on a motion to dismiss a bill in equity on its face. But even in *Mast, Foos & Co.*, the Court regarded consideration of affidavits as appropriate. 177 U. S. at 495. See also Rule 12, FED. R. CIV. P.; MOORE, FEDERAL PRACTICE ¶ 12.09 (2d ed. 1964). What the Court disapproved was dismissal when a question of fact was involved. On this record, in light of the affidavit setting out the Subcommittee resolution, the dismissal does not involve the resolution of any question of fact which may fairly be regarded as disputed.

Williams v. *Fanning,* 332 U. S. 490, 494 (1947), of the indispensability of a superior to a suit for injunctive relief against a subordinate is whether "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." *Cf. Hynes* v. *Grimes Packing Co.,* 337 U. S. 86 (1949). Of course, there is only partly present in this case a relationship between a superior and a subordinate official as there was in *Williams*; nevertheless, the problem of requiring a subordinate official to undertake acts capable of accomplishment only by his superior, which seems central to the purpose of the *Williams* test, also characterizes the difficulties implicit in requiring either of the appellees to return documents held by the full Senate Subcommittee.[5]

The dismissal of appellants' request for injunctive relief to prevent appellees from using the seized records also flows from the undisputed fact that the materials are in the custody of the Subcommittee. Since the documents are now held by the Subcommittee, they are accessible to the appellees only by virtue of their official positions with that body. We cannot prohibit, nor are we asked to prohibit, appellees' use of the documents in the course of their official business for the Subcommittee; and neither do appellants seek any restraint upon the Subcommittee itself. See *Hearst* v. *Black,* 66 U. S. App. D. C. 313, 87 F. 2d 68 (1936), where this court refused to enjoin a congressional committee from using information it had obtained by illegal means. There, considerations resting upon a proper allocation of powers and responsibilities among the coordinate branches of the federal system impelled

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[5] See also *Blackmar* v. *Guerre,* 342 U. S. 512 (1952). That was a suit for reinstatement by a discharged government employee. Because the Civil Service Commissioners were not parties to the suit, and the only defendant before the court could not grant the requested relief without their approval, the Court held that dismissal of the suit was proper.

this court not to exercise its equity powers.[6] In any event, however, the relief requested here is directed solely at appellees. Disclosure of the documents in the course of the Subcommittee's official action would not be prevented by the decree prayed for against appellees; and all other members of the Subcommittee would still have unfettered use of the documents. "A court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of no benefit to the plaintiff." *Virginia Ry.* v. *System Federation No. 40,* 300 U. S. 515, 550 (1937).

No. 18,544

Appellees contend that the grant of their motion for summary judgment was proper because (1) appellants failed to put forward a serious claim that appellees were parties to a knowing concert of action with the state officials, and (2) in any event, the doctrine of legislative immunity insulates appellees from suit. Were only the former involved, we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial. But we need not pursue that inquiry since we think the record before the District Court contained unchallenged facts of a nature and scope sufficient to give appellees an immunity against answerability in damages for actions taken in the course of their legislative activities.[7]

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[6] See also *Jordan* v. *Hutcheson,* 23 F. 2d 597 (4th Cir. 1963); *Pauling* v. *Eastland,* 109 U. S. App. D. C. 342, 288 F. 2d 126, *cert. denied,* 364 U. S. 900 (1960); *Mins* v. *McCarthy,* 93 U. S. App. D. C. 220, 209 F. 2d 307 (1953). See generally *Developments in the Law-Remedies Against the United States and Its Officials,* 70 HARV. L. REV. 827 (1957).

[7] It is settled by *Tenney* v. *Brandhove,* 341 U. S. 367 (1951), that such immunity provides a defense to actions brought for damages under the Civil Rights Act. See also Comment, 40 NOTRE DAME LAW. 70 (1965); Note, 68 HARV. L. REV. 1229 (1955). For general discussions of the Civil Rights Act, see Comment, 49 CALIF. L. REV. 145 (1961), Note, 66 HARV. L. REV. 1285; Comment, 74 YALE L. J.

Appendix A

The issue, in the large, is whether the actions taken with respect to appellants' records were within the scope of appellees' duties for the Senate Subcommittee. Citing our decision in *Shelton* v. *United States,* 177 U. S. App. D. C. 155, 327 F. 2d 601 (1963), appellants argue that the subpoenas were invalid because they were issued and executed without the prior authorization of the Subcommittee, as distinct from its Chairman. *Shelton*, however, held only that a person compelled to testify before a Senate Subcommittee by an invalid subpoena could not be convicted of contempt for failing to respond to the Subcommittee's questions. No necessity existed there for considering the dangers of inhibiting the legislative process by the threat of personal liability to those engaged in it. These are at the core of the public policies reflected in the immunity doctrine.[8]

The Internal Security Subcommittee is required by Senate Resolution to investigate "the extent, nature and effect of subversive activities in the United States. . . ." S. Res. 62, 88th Cong. There is no question that the Senate may legitimately conduct such investigations. As has been said, "The power of Congress to conduct investigations is inherent in the legislative process. That power is broad." *Watkins* v. *United States*, 354 U. S. 178, 187 (1957); see also *Tenney* v. *Brandhove*, 341 U. S. 367, 377-78 (1951). Appellants' own affidavits establish that, for more than a decade, the Subcommittee has evinced an active interest in appellants. As the Subcommittee's Chairman and Chief Counsel, respectively, appellees have immediate responsibilities in the Subcommittee's operations. It is true that the records held by the Louisiana Committee were subpoenaed without prior authorization from the Subcommittee, although the Chairman expressly approved in advance the action pro-

[8] That different considerations are involved when the personal liability of the legislators is involved is illustrated by the facts in *Yellin* v. *United States,* 374 U. S. 109 (1963), which was relied upon in *Shelton*.

posed to be taken. But this action was shortly brought by appellants to the attention of the Subcommittee as a whole, which discussed the matter of the subpoenaed papers. After such consideration the Subcommittee, by formal resolution, incorporated the papers in its hearing record, and provided for their ultimate disposition.

Whether this apparently approving action by the full Subcommittee would serve as a *nunc pro tunc* ratification and consequent validation of the subpoena for all purposes, we need not decide. We do regard it as serving to keep appellees' acts in pursuing the Subcommittee's long-standing interest in appellants within the mainstream of legislative effort to a degree adequate to protect against liability in damages for issuing and executing the subpoena. Appellees acted in an area in which the Subcommittee was competent to function. Had appellees received Subcommittee authorization before issuing the subpoena, the official nature of their actions would be evident. Acting first and receiving authorization later does not, under the facts of this case, put their actions beyond the pale of official legislative activity, at least for purposes of the immunity doctrine.[9]

Nor does *Wheeldin* v. *Wheeler*, 373 U. S. 647 (1963), compel a different result. The plaintiff there sought damages from an investigator for the House Un-American

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[9] What appellants essentially contend is that appellees, by acting without prior authorization, acted with a malicious purpose, *i.e.*, to further a conspiracy to deprive appellants of their civil rights. *Tenney* v. *Brandhove*, however, precludes inquiry into appellees' motives to determine the legitimacy of their conduct:

> The claim of an unworthy purpose does not destroy the privilege. . . . The privilege would be of little value if they [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck*, . . . that it was not consonant with our scheme of government to inquire into the motives of legislators, has remained unquestioned. 341 U. S. at 377.

Appendix A

Activities Committee for the allegedly malicious act of serving a subpoena which had been approved by no one, either before or after its issuance. In the Supreme Court the Solicitor General conceded that the complaint on its face showed the defendant to be acting wholly outside the scope of his official duties; and this concession prompted the Court, in the course of otherwise holding that no federal cause of action was made out by the complaint, to note that the immunity doctrine had no relevance. Here, unlike *Wheeldin*, the record before us shows without dispute not only that the subpoena was expressly authorized in the first instance by the Chairman of the legislative committee, but also that the full committee ratified the action taken when the matter was promptly brought to its attention. Even if it be assumed that there remained a legal hiatus in the title of the subpoenaing authority, immunity from suit is not thereby destroyed. As was said by the dissenting judge in *Wheeldin:* "The question of authority is, of course, distinct from that of immunity from civil suit. Even an unauthorized act may be within the scope of the immunity, so long as it is within the 'outer perimeter' of the officer's 'line of duty.'" [10] 373 U. S. at 656 n. 4. This is, of course, "a matter of defense," but summary judgment may rest upon such a defense where, as here, its existence is established by facts which are undisputed.

Finally, appellants contend that because they charge appellees to have conspired with various officials under the color of *state* law, appellees can claim no immunity because

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[10] Judge Learned Hand once put the point in these terms:

"[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake in the face of which an official may later find himself hard put to satisfy a jury of his good faith. . . . [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try

of their positions with the Senate Subcommittee. It is argued that appellees' positions with that body must be regarded as incidental and irrelevant to the present suit; and that appellees are to be viewed as in the position of any other citizen. This, however, ignores that the conduct of which appellants complain (appellees' activities pursuant to the subpoena) could not have been undertaken had appellees had no official legislative positions and responsibilities.[11]

The judgments of the District Court are

Affirmed.

Washington, *Senior Circuit Judge,* did not participate in this decision.

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to do their duty to the constant dread of retaliation." *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (2d Cir. 1949), *cert. denied,* 339 U. S. 949 (1950).

See also *Barr* v. *Matteo,* 360 U. S. 564 (1959); *Cooper* v. *O'Connor,* 69 U. S. App. D. C. 100, 99 F. 2d 135, *cert. denied,* 305 U. S. 642 (1938); *Brownfield* v. *Landon,* 113 U. S. App. D. C. 248, 307 F. 2d 389, *cert. denied,* 371 U. S. 924 (1962); *Bershad* v. *Wood,* 290 F. 2d 714 (9th Cir. 1961).

[11] Although it has been suggested that the protection of the legislative immunity doctrine does not extend to appellee Sourwine, cf. *Kilbourn* v. *Thompson,* 103 U. S. 168 (1880), what was said in *Barr* v. *Matteo* about the immunity of executive officials seems persuasive here. "The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions . . ." 360 U. S. at 572-73. See also, *Cooper* v. *O'Connor, supra*; *Bershad* v. *Wood, supra.*

APPENDIX B

The Court: This is an action against Senator Eastland, the Chairman of the Senate Judiciary Committee, J. G. Sourwine, the counsel of one of the subcommittees of that Committee, and numerous other defendants. Only Senator Eastland and Mr. Sourwine have been served with process. The other defendants have not been served and have not appeared and consequently they are not before the Court.

The action has two aspects insofar as the two defendants who have appeared are concerned. First, it seeks an injunction against the reproduction and use of certain documents that have come into the possession of the Senate Judiciary Committee. Second, it seeks money damages. Although in form only one count is set forth, actually there are two claims for relief or two causes of action, which for the sake of clarity should be set forth as two separate counts.

The plaintiff has moved for a preliminary injunction against the two defendants who have appeared and now seeks to withdraw that motion, stating, however, that it desires to renew it if it can secure additional evidence which it proposed to do, in part at least, by taking the deposition of one of the defendants.

Counsel for the two defendants contend that the cause of action for an injunction does not set forth a valid claim for relief and that under no set of circumstances that could be proven thereunder could the plaintiff prevail and counsel for the two defendants accordingly ask the Court to dismiss that cause of action as to them at this time.

This procedure has been approved by the Supreme Court in Mast Foos & Company v. Stover Manufacturing Company, 177 U. S. 485, 495.

This case involves the basic principle of constitutional law of separation of power. Sometimes we tend, amidst dealing with numerous details, to forget the basic principles

of law and it is useful occasionally to refresh ourselves at the fountain of the basic principles.

It is elementary that our Federal Government is divided into three coordinate branches. No one of the three may interfere with the activities of either of the other two except in the limited matters as provided by other provisions of the Constitution. Consequently, this Court may not enjoin a Congressional committee from pursuing its activities.

If any authority is needed to support this elementary principle the Court may refer to Hearst v. Black, 66 App. D. C. 313, in which in an opinion written by Judge Groner the Court of Appeals for this jurisdiction held that a Senate committee could not be enjoined from making use of certain telegrams which had come into its possession and which it was claimed by the plaintiff had been seized illegally.

In Methodist Federation For Social Action v. Eastland, 141 F. Supp. 729, a Three-Judge Court in this District, in an opinion written by Circuit Judge Edgerton, held that the courts could not enjoin a subcommittee of the Senate Committee on the Judiciary from printing and circulating a pamphlet. In this case Judge Edgarton made this significant statement:

> "We have no more authority to prevent Congress or a committee or public officer acting at the express direction of Congress from publishing a document than to prevent them from publishing the Congressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem. The Constitutional history called to our attention includes no instance in which an English court has attempted to restrain Parliament or an American

court to restrain Congress from publishing any statement. This history therefore tends to confirm our view."

In the light of this discussion the Court will dismiss as to defendants Senator Eastland and Mr. Sourwine the alleged claim for an injunction.

You may submit an order accordingly.

APPENDIX C

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

SECTION B

No. 183 459

Vic. R. S. 14:360

---o---

STATE OF LOUISIANA

against

JAMES A. DOMBROWSKI

---o---

JUDGMENT

On January 29, 1964 the Orleans Parish Grand Jury found a True Bill against the defendant, charging said defendant with violating Revised Statute 14:360. On March 5, 1964 the defendant, through his counsel of record,

filed a Motion for Prayer for Oyer and a Motion to Suppress the evidence. Hearing was had on the Motion to Suppress on March 23, 1964 and at the conclusion of the presentation of evidence and brief argument by both the State and the Defense, the matter was continued as an open matter for purposes of filing briefs. Briefs were received by the Court from both the State and Defense at which time the matter was taken under advisement. At the same time, the time of the presentation of the briefs, counsel for defendant filed a Plea of Res Judicata and, accordingly this, too, was taken under advisement. On May 28, 1964 the State, through the Assistant District Attorney, filed its Answer to the Plea of Res Judicata and other memoranda in support of their positions. The matter was then set for further argument on June 9, 1964.

As to the Plea of Res Judicata counsel for defense cites to the Court that this matter Case No. 181 975 of Section E of the Criminal District Court for the Parish of Orleans involving the same defendant, and the same Search Warrants here involved, found that the State witnesses "obviously have not justified the arrest . . ." and ". . . since there has not been a prima facie case made against these three defendants and, therefore discharges them without date." (Transcript of the record.)

Counsel for defendant points out that since they found the [sic] Arrest Warrants of the defendant was found to be illegal then, necessarily, the Search Warrants, issued concurrently with the Arrest Warrants, and upon the same application, are also illegal and Pleads Res Judicata, citing to the Court the recent decision of the Supreme Court of Louisiana in the case of State v. Latil, 92 So. 2, 63; and quoting other decisions. The State, in its argument, admits the hearing in Section E of this Court, admits the determination as regards the validity of the arrest warrant,

but denies that there was a determination of the identical, factual and legal issues were involved.

This Court must accept the argument of the defendant and reject that of the State.

On the question of the suppression of the evidence, both the defense and the State have presented this Court with lengthy arguments and briefs. Needless to say, the historic Mapp v. Ohio (367 U. S. 643, 81 S. Ct. 1686, 1961) was cited to the Court by the defendant, along with many, many other citations. Further, in the matter of Marcus et al. v. The Search Warrant of Property, etc., 367 U. S. 717 the Court found that the authorities in seizing more property than that which was specifically declared in the warrant acted illegally. This is particularly what took place in this matter presently before this Court; even to the extent that the State has offered to return to the defendant all of the material which they do not consider contraband.

The Court feels that *at least* in view of the two cases cited supra, not to mention other grounds, that the State exceeded its authority in carrying out this search and seizure, and accordingly,

It is ORDERED, ADJUDGED and DECREED that the Motion to Suppress and the Plea of Res Adjudicata herein filed be and the same are hereby Maintained.

JUDGMENT READ, RENDERED and SIGNED IN OPEN COURT THIS 12th day of JUNE 1964.

/s/ George P. Platt
GEORGE P. PLATT,
Judge, Section B.

Clerk's Office, June 15, 1964.
A TRUE COPY.

GEO. SMITH, *Deputy Clerk,*
Criminal District Court,
Parish of Orleans.

APPENDIX D

Minute Entry
April 20, 1964
AINSWORTH, J.

No. 13967

CIVIL ACTION

DIVISION D

—o—

JAMES A. DOMBROWSKI, *et al.*,

versus

COLONEL THOMAS D. BURBANK, *et al.*

—o—

This matter came on for hearing on a former day on motion of defendant, James H. Pfister, to dismiss or, in the alternative, for summary judgment. The court, having heard the argument of counsel and having considered the briefs, affidavits and deposition in support thereof, is now ready to rule.

IT IS ORDERED that motion of defendant, James H. Pfister, to dismiss be, and the same is hereby, DENIED.

REASONS

Mover, a member of the Louisiana Legislature is entitled to absolute immunity under the doctrine of *Tenney* v. *Brandhove*, 341 U. S. 367, 71 S. Ct. 783 (1951), if the affidavits and deposition submitted by the parties indicate that he was acting at the time "in the sphere of legitimate legislative activity." Here there is a sharp dispute as to the

facts upon which we can conclude whether or not the defendant was engaged in permissible legislative activity on the dates when he is alleged to have committed tortious acts against plaintiff. As was said in *Tenney*, supra, "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation." The United States Supreme Court decision was therefore predicated upon the state of facts which it found in the *Tenney* case. Since there is a genuine issue as to material facts, summary judgment is not permissible under Rule 56 of the Federal Rules of Civil Procedure. See National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir. 1962, 305 F. 2d 647. A full trial on the merits is necessary to determine the respective rights of the parties. We express no opinion now as to the facts, beyond stating that they are vigorously disputed between the involved parties.

APPENDIX E

Minute Entry
March 18, 1965
AINSWORTH, J.

No. 13967

CIVIL ACTION

DIVISION D

JAMES A. DOMBROWSKI, *et al.*,

versus

COLONEL THOMAS D. BURBANK, *et al.*

This matter came on for hearing on a former day on motions of defendant, James H. Pfister, to dismiss the complaint against him and for summary judgment in his favor and, alternatively, for an order as authorized by 28 U. S. C. § 1292(b).

The Court, having heard the argument of counsel and having considered the affidavits, deposition and briefs in support thereof and opposed thereto, is now ready to rule.

IT IS ORDERED that the motions of defendant, James H. Pfister, to dismiss the complaint against him and for summary judgment in his favor be, and the same are hereby, DENIED.

IT IS FURTHER ORDERED that the alternative motion for an order as authorized by 28 U. S. C. § 1292(b) be, and the same is hereby, GRANTED.

Appendix E

REASONS

By our minute entry dated April 20, 1964, we denied the motion of defendant, James H. Pfister, to dismiss or, in the alternative, for summary judgment. This motion is a renewal thereof and is denied for substantially the same reasons as are contained in our former ruling. There is no disagreement between the Court and mover as to the law of the case. It is found in *Tenney* v. *Brandhove*, 341 U. S. 367, 71 S. Ct. 783 (1951), where the Court held that a member of a State legislature was entitled to immunity from suit for damages, under the particular facts there submitted. The Supreme Court in *Tenney* said:

> "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation."

As we said in our prior decision, *Tenney* was decided by the Court upon the state of facts which it found, that is, that the complained of acts of the legislator were deemed to be fairly within the province of the Committee's inquiry and, therefore, immune to suit for damages. Here that question is disputed in the most vigorous manner by opposing affidavits submitted by the plaintiff and the deposition of defendant Pfister. In *Norton* v. *McShane*, 5 Cir., 1964, 332 F. 2d 855, the Court granted immunity to certain federal officials growing out of the Ole Miss confrontation because the affidavits submitted by respondents were uncontroverted. That is not true here. Not only are they controverted, but the credibility of the statements of defendant Pfister is also contested by plaintiff. As was said in plain-

tiff's memorandum in opposition to the present motions, "This overlooks the significant fact that whereas the affidavits of third party defendants are not controverted, the affidavit of defendant Pfister concerning his lack of participation in the tortious acts complained of *is very much controverted* by his own public statements on the date of the raid, October 4, 1963, to public, press, radio and T.V." Then plaintiff refers to his own affidavit filed herein in March, 1964, in which he attached a transcript of an interview of Mr. Pfister over New Orleans Station WDSU-TV and in which plaintiff alleges that Mr. Pfister made the following statement:

> "Today's operation has been done jointly by the Louisiana State Police and the New Orleans Police Department at our request. This has been a combined operation of substantial complexity and we are very much in debt to these fine police agencies for their splendid work and their splendid cooperation. We particularly commend them for the very efficient and professional manner in which they have handled the mechanics of their raid and the delicate problems arising therefrom. Today's raids have been on the offices and homes of certain key figures and key officers and members of the Southern Conference Educational Fund who have been actively, and probably under Louisiana statutes, illegally, operating a Communist front organization here in the City of New Orleans. The evidence seized in the raids may be subpoenaed by our committee. The federal authorities have taken no official action against this Communist front group despite two separate Congressional committee hearings on its activities. It appears that there is a definite need for legislative action on the state level to cope with such organizations. The Southern Conference Edu-

cational Fund has been operating openly in New Orleans for many years to the intense disgust of most decent citizens who know what the organization really is. Under the guise and the sham of the racial issue, many good and well meaning people have been duped into supporting this Communist-led group. It appears that a substantial amount of material has been obtained. It will take some time for it to be carefully evaluated. The committee plans to hold open hearings on this subject matter in the future. Our committee counsel, Jack N. Rogers, and our committee staff director, Col. Frederick C. Alexander, Jr., both of Baton Rouge, deserve much credit for the extensive investigation and the very intensive planning which necessarily preceded this operation. All of the members of our committee have unanimously concurred in the operation which took place today."

In plaintiff's memorandum of March 1, 1965, he said:

> "In addition, a deposition of Judge Thomas Brahney, recently dismissed by Pfister as a third party defendant, likewise *tends to cast some doubt* on Mr. Pfister's allegation that he knew nothing of the raid prior to the occurrence."

It is clear that plaintiff is attacking the credibility of Mr. Pfister. Whether he has a right to do so can only be determined after a trial of this material issue which is so strongly contested between these two parties. We are unable to do so on the motions before us because a trial court should not on a motion for summary judgment attempt to determine questions of credibility. *Girard* v. *Gill*, 4 Cir., 1958, 261 F. 2d 695; *Blenke Brothers Co.* v. *Ford Motor Company*, D. C., N. D. Ind., 1963, 217 F. Supp. 459; *Holdeen* v. *United States*, D. C., S. D. N. Y., 1960, 186

F. Supp. 76; *Buren* v. *Schein,* D. C,, E D. N. Y., 1963, 32 F. R. D. 218; and summary judgment is usually not possible in a conspiracy case such as is alleged here. *Deterjet Corp.* v. *United Aircraft Corp.,* D. C., D. Del., 1962, 211 F. Supp. 348. A summary judgment should only be given when it is quite clear what the truth is, *Koepfle* v. *Garavaglia,* 6 Cir., 1952, 200 F. 2d 191, and should never be entered except where the defendant is entitled to its allowance *beyond all doubt. Mitchell* v. *Pilgrim Holiness Church Corp.,* 7 Cir., 1954, 210 F. 2d 879. In passing upon such a motion it is no part of the Court's function to decide issues of fact but solely to determine whether there are issues of fact to be tried. *Hoffman* v. *Babbitt Bros. Trading Co.,* 9 Cir., 1953, 203 F. 2d 636. The standard in passing on a motion for summary judgment is *strict* and it should be granted only when it is *perfectly clear* that no issue of fact is involved. *Clarke* v. *Montgomery Ward & Company,* 4 Cir., 1962, 298 F. 2d 346. It is an *extreme remedy* and should be granted only when the facts are quite clear and any doubt must be resolved against movant. *Gunther* v. *San Diego & Arizona Eastern Railway Co.,* D. C., S. D. Cal., 1961, 192 F. Supp. 882. Where there is the *slightest* doubt as to the facts, the motion should be denied. *Dale Hilton, Inc.* v. *Triangle Publications, Inc.,* D. C., S. D. N. Y., 1961, 27 F. R. D. 468. In order for the Court to issue a summary judgment there must be no disputed questions of fact or conflicting inferences to be drawn from undisputed facts which, if settled against the moving party, would allow the plaintiff to recover. *Sheets* v. *Burman,* 5 Cir., 1963, 322 F. 2d 277.

We emphasize that what we say here and what was said in our April 20, 1964 minute entry evidences no opinion by the Court as to the facts involved. The facts are material, however, and though the determination as set forth in *Tenney* is narrow because the issue is whether the com-

plained of acts of defendant Pfister may fairly be deemed within the province of the Legislative Committee's inquiry and it must be obvious that there was a usurpation of functions, the present state of the record leaves us no alternative but to deny the motion for summary judgment.

The alternative motion for an order under 28 U.S.C. § 1292(b) is more complicated. Respondent argues that he has an *absolute* immunity under the *Tenney* rule from a suit for damages for acts done in his capacity as a State legislator because he contends that his deposition and the affidavits show that the complained of acts should "fairly be deemed within the province" of the Legislative Committee's inquiry, of which he was Chairman; and as was said in *McShane,* he was acting within the "outer perimeter" of his line of duty as Chairman of the Legislative Committee. We do not read *Tenney* as granting an absolute immunity from all acts of a State legislator. It is our belief that the law of the *Tenney* case requires an examination of the facts to see if the legislator's acts may "fairly be deemed within the province" of legislative activity. Respondent reads *McShane* also as granting immunity because respondent contends that the deposition and affidavits conclusively show that his acts as a State legislator were within the "outer perimeter" of his line of duty as Chairman of the Legislative Committee. There is involved, therefore, a controlling question of law as to whether there is an absolute legislative immunity under the circumstances here. The difficulty is that the circumstances are disputed and we do not think it possible to resolve them without a trial on the merits. However, the record indicates that respondent Pfister will appeal from our recent dismissal of his third-party complaint against his co-legislator members of the Legislative Committee. We signed a final judgment in that matter pursuant to Rule 54(b), and the judgment is appealable. In the interest of judicial economy we have granted an order for an interlocutory appeal here in order

that the question of law contended for by respondent Pfister may be determined. However, by doing so we do not in any way change our belief that summary judgment is not possible under the circumstances of the record here. A consideration of the appeal from our judgment dismissing Pfister's third-party complaint against his co-legislators will necessarily involve the same issue of law as was raised on the present motions. Thus the granting of an immediate appeal from our present order may materially advance the ultimate termination of the litigation.

plained of acts of defendant Pfister may fairly be deemed within the province of the Legislative Committee's inquiry and it must be obvious that there was a usurpation of functions, the present state of the record leaves us no alternative but to deny the motion for summary judgment.

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that the question of law contended for by respondent Pfister may be determined. However, by doing so we do not in any way change our belief that summary judgment is not possible under the circumstances of the record here. A consideration of the appeal from our judgment dismissing Pfister's third-party complaint against his co-legislators will necessarily involve the same issue of law as was raised on the present motions. Thus the granting of an immediate appeal from our present order may materially advance the ultimate termination of the litigation.

MSS 546 SEDFRE

Douglas, C.H. et al. vs. C.O.R.E. Nov. 1961 - Nov. 1963

Box 36 Folder 17

State Historical Society of Wisconsin

Please Retain Original Order

C12

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
DEC 9 1961
Loryce E. Wharton, Clerk
By
Deputy

CIVIL ACTION NO. 3223

C. H. DOUGLAS, ET AL — PLAINTIFFS

VS.

THE CONGRESS OF RACIAL EQUALITY, ET AL — DEFENDANTS

ORDER EXTENDING TEMPORARY
RESTRAINING ORDER

On December 7, 1961, the Court heard all of the testimony and received all of the evidence adduced by the parties in support of Plaintiffs application for a temporary injunction and defendants several motions filed at and during the trial in general opposition thereto, and the Court having heard arguments of counsel for the parties requested briefs from the parties on or before December 13, 1961, and it appearing to the Court that the temporary restraining order was entered herein at 4:00 o'clock P. M. on December 2, 1961, and will thus expire before the Court has an opportunity to study the case before decision as it intends to do and that good cause is thus shown for an extension of said temporary restraining order for an additional period of ten days after the expiration of the force and effect of the original temporary restraining order;

IT IS, THEREFORE, SO ORDERED, ADJUDGED AND DECREED by the Court:

(1) That the temporary restraining order entered herein by the Court at 4:00 P. M. on December 2, 1961, is extended for an additional period of ten days after date of expiration of the original temporary restraining order and under all of the terms, provisions and conditions thereof the same as if were specifically incorporated herein;

(2) That an attested copy of this order shall be mailed by the Clerk of this Court in the United States mail addressed to Messrs. Carl Rachlin, 380 Broadway, New York, New York; Derrick Bell, 10 Columbus Circle, Suite 1790, New York 19, New York; Wiley Branton, Pine Bluff, Arkansas; and William M. Kunstler, 511 Fifth Avenue, New York, New York, which shall serve as a notice to the Defendants of the extension of said temporary restraining order under Rule 65 (b) of the Federal Rules of Civil Procedure as aforesaid.

ORDERED, ADJUDGED AND DECREED this December 9, 1961.

/s/ Harold Cox
UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY.
LORYCE E. WHARTON, CLERK
BY:

E. Thompson
Deputy Clerk

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
SOUTHERN DISTRICT OF MISSISSIPPI

RECEIVED
DEC 22 1961
VLADECK & ...

Jackson, Mississippi
December 19, 1961

Hon. Joe T. Patterson
Attorney General of the
State of Mississippi
Jackson, Mississippi

Hon. Charles Clark
P. O. Box 1046
Jackson, Mississippi

Hon. Carl Rachlin
280 Broadway
New York, New York

Hon. Derrick Bell
10 Columbus Circle
New York, New York

Hon. Wiley Branton
Pine Bluff, Arkansas

Hon. William M. Kunstler
511 Fifth Avenue
New York, New York

Gentlemen:

Re: C. H. Douglas, et al

vs. Jackson Division of the
Southern District of
Mississippi
Civil Action No. 3223

The Congress of Racial
Equality, Inc., et al

I attach hereto a certified copy of three orders dictated and signed by Judge William Harold Cox on December 18, 1961. Said orders were filed and recorded in the above styled and numbered cause on said date.

Sincerely,

LORYCE E. WHARTON, CLERK
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI

Enclosures

RECEIVED
DEC 22 1961
VLADECK & ELIAS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
DEC 18 1961
Laryce E. Wharton, Clerk
By
Deputy

CIVIL ACTION NO. 3223

C. H. DOUGLAS, ET AL, PLAINTIFFS

VS.

THE CONGRESS OF RACIAL EQUALITY, INC., ET AL DEFENDANTS

ORDER OVERRULING DEFENDANT'S, CONGRESS OF RACIAL EQUALITY, INC., MOTION TO DISSOLVE THE TEMPORARY RESTRAINING ORDER AND IN OPPOSITION TO THE MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE coming on to be heard on motion of the Defendant Congress of Racial Equality, Inc., for a dissolution of the temporary restraining order and in opposition to the temporary injunction and the Court having heard and considered said motion with the testimony in this case and the arguments and briefs of counsel and being fully advised in the premises is of the opinion that this Court has full jurisdiction of the subject matter and the parties and finds that the relief requested in this case does not violate any vested constitutional right of the Defendants; it being the opinion of this Court that no person or organization has any vested right to violate any valid law of this State or to deliberately provoke others to breach the peace and engage in acts of violence while merely incidentally and ostensibly enjoying the status of interstate or intrastate passengers with incident facilities; and it is the considered opinion and judgment of this Court that this motion is without merit and should be overruled.

C.R. 1961 Doc. 1455/16

IT IS, THEREFORE, SO ORDERED, ADJUDGED AND DECREED by the Court that Defendant's said motion to dissolve the temporary restraining order herein be and is hereby overruled.

ORDERED, ADJUDGED AND DECREED this December 18th, A. D., 1961.

UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY.
LORYCE E. WHARTON, CLERK
BY:

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
DEC 18 1961
Loryce E. Wharton, Clerk
By [signature] Deputy

CIVIL ACTION NO. 3223

.. DOUGLAS, ET AL, PLAINTIFFS

VS.

THE CONGRESS OF RACIAL EQUALITY, INC., ET AL DEFENDANTS

ORDER OVERRULING MOTION OF DEFENDANT TO DISMISS

THIS CAUSE coming on to be heard on motion of Defendant Congress of Racial Equality, Inc., to dismiss the complaint on thirteen assigned grounds and the Court having heard and considered said motion and being fully advised in the premises is of the opinion that the complaint states a claim against the Defendants upon which relief may be granted and that the Court has full jurisdiction of the subject matter and the parties as a diversity suit and that the motion is without merit and should be overruled.

IT IS, THEREFORE, SO ORDERED, ADJUDGED AND DECREED by the Court that the motion of the Defendant Congress of Racial Equality, Inc., to dismiss this suit be and is hereby overruled.

ORDERED, ADJUDGED AND DECREED this December 18th, A. D., 1961.

A TRUE COPY, I HEREBY CERTIFY.
LORYCE E. WHARTON, CLERK
BY: [signature]
Deputy Clerk

[signature]
UNITED STATES DISTRICT JUDGE

SB 1961 R.2.607

A TRUE COPY, I HEREB[illegible]TIFY.
LORYCE E. WHARTON, CLERK
BY:

J Speights

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
DEC 18 1961
Loryce E. Wharton, Clerk
By [signature] Deputy

CIVIL ACTION NO. 3223

C. H. DOUGLAS, ET AL, PLAINTIFFS

VS.

THE CONGRESS OF RACIAL EQUALITY, INC., ET AL DEFENDANTS

ORDER DENYING APPLICATION FOR THREE-JUDGE COURT

THIS CAUSE coming on to be heard on application of the Defendant Congress of Racial Equality, Inc., to organize and convene a Three-Judge Court as provided by 28 U.S.C.A., § 2284 and § 2325 and the Court having fully heard and considered all of the evidence and testimony and arguments of counsel thereon and being thus fully advised in the premises is of the opinion and so finds that the relief requested in this case does not in anywise or to any extent involve restraining the enforcement, operation or execution in whole or in part of any order of the Interstate Commerce Commission and that said application is without merit and should be denied.

IT IS, THEREFORE, SO ORDERED, ADJUDGED AND DECREED by the Court that the application of Congress of Racial Equality, Inc., for organizing and convening a Three-Judge Court to try this case is without merit and is therefore denied.

ORDERED, ADJUDGED AND DECREED this December 18th, A. D., 1961.

[signature]

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

C. H. DOUGLAS, etc., et al., Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 3223
THE CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE, Defendants.	:	

CERTIFICATE OF SERVICE

This is to certify that on this the 7th day of December, 1961, the undersigned counsel for defendant in this action, personally served a copy of the foregoing Motion to Stay Action, Application for Three-Judge Court, Motion to Dissolve the Temporary Restraining Order, and Motion in Opposition to the Temporary Injunction upon counsel for plaintiffs, Charles Clark, Norman Gillis, Jr. and Lovis Alford.

Carl A. Rachlin
280 Broadway
New York, New York

Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

C. H. DOUGLAS, etc., et al., Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 3223
THE CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE, Defendants.	:	

MOTION TO STAY ACTION

Defendant Congress of Racial Equality, Inc., moves the court for an order staying further proceedings in this case, and bases said motion upon the following grounds:

1. There is pending before a three-judge federal court of this district the case of United States v. Mayor and Selectmen of McComb City, Civil Action No. 3215.

2. The above-mentioned case concerns the same subject matter as this case, i.e., racial segregation in the interstate bus terminal facilities in McComb City, Mississippi, concerns similar issues of law and fact, and the judgments in that case affect the rights of all of the parties to this case.

3. The plaintiff, C. H. Douglas, is a party-defendant in the above-mentioned case. The plaintiffs, Mr. and Mrs. Aubrey

McGehee, have a right to intervene in the above-mentioned case in order to assert the claims made herein pursuant to 28 U.S.C., §2323; the defendants have the same right.

4. The rules of comity require that this Court refrain from ruling on this matter which is pending before a three-judge court in Civil Action No. 3215, in order to avoid the possibility of unseemly conflict with the decisions and judgments in that case affecting the same subject matter.

5. The grant of relief requested by plaintiffs in this action would deprive defendant of the benefits of the preliminary injunction in Civil Action No. 3215 in an order filed on November 27, 1961.

6. The relief requested by plaintiffs here cannot be granted by this court, and can only be granted by a three-judge court, under the provisions of 28 U.S.C. §2325.

Respectfully submitted,

Carl M. Rachlin
280 Broadway
New York, N. Y.

Derrick A. Bell
10 Columbus Circle
New York 19, N. Y.

Attorneys for Defendant

Of Counsel:

Jack Greenberg
Wiley Branton
James M. Nabrit, III

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

FIFTH CIRCUIT

C. H. DOUGLAS, Individually and as Mayor of the City of McComb City, Mississippi, and MR. & MRS. AUBREY McGEHEE, Plaintiffs,	:	
v.	:	No. 3223
THE CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE, Defendants.	:	

MEMORANDUM OF LAW

The Injunction Granted By The Court Below Restraining Defendants From Continuing to Sponsor, Finance Or Encourage Persons To Utilize The Terminal Facilities Located In The City Of McComb City, Mississippi And From Continuing To Utilize Said Terminal Facilities Is In Conflict With Defendants Rights Under The Constitution And Laws Of The United States.

A. Testing of legislation, peacefully demonstrating and protesting against laws and ordinances, and sponsoring such tests and demonstrations, are forms of free speech protected by the First Amendment. See, e.g., DeJonge v. Oregon, 299 U.S. 353. Similarly, travel is not only basic to the Nation (The Passenger Cases, 7 How. 282, 492) but is the Constitutional right protected by the Due Process Clause. Kent v. Dulles, 357 U.S. 116; Edwards v. California, 314 U.S. 160-172;

Shachtman v. Dulles, 225 F.2d 938 (C.A. D.C. 1955).

The activities carried on by defendants were peaceful and lawful. Riots and disorders were organized and perpetrated by others. Thus the crux of the issue before the Court is whether the peaceful exercise of free speech, travel, and freedom from the necessity of using segregated facilities in interstate commerce may be prohibited because such exercise may provoke others to breach of the peace or riot.

The law on this issue is settled. Those who exercise Constitutionally protected rights could neither be punished nor stopped unless they themselves are guilty of affirmative acts of wrong doing. In particular, they cannot be punished or stopped merely because their activities would cause unlawful action from others who may seek to suppress or punish them.

In Cooper v. Aaron, 358 U.S. 1, 16, the unanimous Supreme Court stated:

> "The Constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature.
>
> "...law and order are not...to be preserved by denying the Negro children of their Constitutional rights."

See also, Buchanan v. Warley, 245 U.S. 60, 81.

In Sellers v. Johnson, 163 F.2d 877 (C.A. 8th Cir. 1947) cert. denied, 332 U.S. 851 the court was concerned with an attempt of a group of Jehovah's witnesses to hold a series of religious meetings in a public park. The speaker at the first meeting was harassed and interfered with but succeeded in delivering his lecture. A large number of opponents of the Jehovah's witnesses gathered for the second meeting, rioted, attacked the Jehovah's witnesses and injured a number of them. Thereupon the town council adopted a resolution denying the Jehovah's witnesses a permit for use of the park. The district court dismissed a complaint under the Civil Rights Act which would have revoked the denial of the permit. The Court of Appeals reversed, holding (163 F. 2d at 881):

> The theory that a group of individuals may be deprived of their constitutional rights of assembly, speech and worship if they have become so unpopular with, or offensive to, the people of a community that their presence in a public park to deliver a Bible lecture is likely to result in riot and bloodshed, is interesting but somewhat difficult to accept. Under such a doctrine, unpopular political, racial, and religious groups might find themselves virtually inarticulate. Certainly the fundamental rights to assemble, to speak, and to worship cannot be abridged merely because persons threaten to stage a riot or because peace officers believe or are afraid that breaches of the peace will occur if the rights are exercised.
>
> In the case of Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, the Committee on the Bill of Rights of the American Bar Association filed a brief, as amici curiae, in which they had this to say on the subject of anticipated disorder as a basis for the abridgment of constitutional rights (pages 679, 680 of 307 U.S.):
>
> "*** It is natural that threats of trouble should often accompany meetings on controversial questions.

But meetings may not be suppressed on that account. The practice under ordinary conditions in our large cities is for the authorities to arrange with the applicants to have the meeting held in a suitable place, and to have enough policemen on hand to quell apprehended disturbances."

"The real question at issue is whether any threat of disorder, even though only by opponents of the speakers, excuses denial of permits. If so, the right of free assembly will have become a mockery. The right would thus be subject to destruction by an arbitrary official decision, notwithstanding that the Bill of Rights was intended to protect citizens from arbitrary action of that very character."

"To 'secure' the rights of free speech and assembly against 'abridgment,' it is essential not to yield to threats of disorder. Otherwise these rights of the people to meet and of speakers to address the citizens so gathered, could not merely be 'abridged' but could be destroyed by the action of a small minority of persons hostile to the speaker or to the views he would be likely to express."

And in Rockwell v. Morris, 211 N.Y.S. 2d 25 (1961), suit was brought to compel the Commissioner of Parks of the City of New York to issue to Rockwell a license to speak in a city park. His petition was dismissed by the trial court on the ground that appellant "had by speech and pamphlet accused more than two and a half million residents of New York City of being traitors, identified by their ethnic and religious classification, that he was a 'self-confessed advocate of violence,' and Hitlerian methods; and that if he spoke it was 'inevitable that public disorder * * * [would] result.'" Id. at 28. The Supreme Court Appellate Division, reversed, and in language directly applicable here stated (211 N.Y.S. 2d at 35-38):

> * * * if the speaker incites others to immediate unlawful action he may be punished -- in a proper case,

stopped when disorder actually impends; but this is not to be confused with unlawful action from others who seek unlawfully to suppress or punish the speaker.* * *

No doubt suppressing a minority is easier than keeping a misbehaving majority in line. But that is exactly the purpose of law, and of government under law.* * * Only if Rockwell speaks criminally (or, perhaps, if it is established on a proper record, in that very rare case, that he will speak criminally, not because he once did, but that he will this time) can his right to speak be cut off. If he does not speak criminally, then, of course, his right to speak may not be cut off, no matter how offensive his speech may be to others. Instead, his right, and that of those who wish to listen to him, must be protected, no matter how unpleasant to the assignment.* * *

* * * * *

It is not law or order that is fashioned to avoid riot at the expense of compromising constitutional guarantees. Instead, it is something which can end only in anarchy and then tyranny.

We have been able to find no case in which the exercise of lawful, peaceful, constitutionally protected activity has been proscribed because such activity was expected to arouse unlawful violence by others. Even in the cases which have gone farthest in curbing speech to protect public safety, the courts have always required an element of active incitement by the speaker, E.g., Feiner v. New York, 340 U.S. 315 (1951), where the Court emphasized that Feiner "[passed] the bounds of argument or persuasion and [undertook] incitement to riot." Compare also Terminiello v. City of Chicago, 337 U.S. 1 (1949).

The vice inherent in the prohibition of lawful activity is aggravated by the injunctive feature of the order. In this

case, we are dealing not, as in Feiner and other similar cases, with a criminal prosecution for breach of the peace undertaken after a situation of great peril had developed which could not be stopped except by requesting the speaker to desist, and upon his refusal, by arresting him. The order entered by the Court in this case is in the nature of that most disfavored of all devices in our legal system -- a prior restraint. The court in Rockwell, supra, summarized the law thusly:

> * * * there is no power in government under our Constitution to exercise prior restraint of the expression of views, unless it is demonstrable on a record that such expression will immediately and irreparably create injury to the public weal -- not that such expression without being itself unlawful, will incite criminal acts in others.

See also, Cantwell v. Connecticut, 310 U.S. 296, 306 (1940).

It is clear that defendants merely travel or sponsored travel in interstate commerce on the basis of licensed common carriers and peacefully sought to use the transportation and terminal facilities of the carriers without submitting to racial discrimination and segregation. Thus, their conduct was not only lawful but protected by the constitution and laws of the United States. See Regulation No. MC-C-3358 promulgated by the Interstate Commerce Commission effective November 1, 1961, 49 U.S.C. 316(d); Henderson v. United States, 339 U.S. 816; Keys v. Carolina Coach Co., 64 M.C.C. 769; Boynton v. Virginia,

364 U.S. 454; Morgan v. Virginia, 328 U.S. 373.

As recently as November 21, 1961 the three-judge United States District Court has enjoined the Mayor and Selectmen of McComb City and the police chief from seeking to enforce or coerce segregation of the white and Negro races, neither use the terminal facilities used in interstate commerce; interfering in any way or in any means with compliance by the Greyhound Corporation with the laws of the United States and the Regulations of the Interstate Commerce Commission prohibiting racial discrimination in the vehicles and facilities of interstate commerce and placing, maintaining or displaying in or near the Greyhound Bus Terminal in McComb City, signs indicating or suggesting that any of the terminal facilities are for the use of persons of any particular race or color. The action of the Court is predicated upon the opinion that Sections 2351.5, 2351.7 and 7787.5 of the Mississippi Code are unconstitutional, null and void in that they require segregation, contrary to and in conflict with the Commerce Clause; the Supremacy Clause of Article VI of the Constitution and the Fourteenth Amendment to the Constitution of the United States and that they conflict with the Regulation of the Interstate

Commerce Commission entered November 1st and with 49 U.S.C. 316(d).

It is submitted that the Order of the court below enjoining defendants from using or sponsoring the use of the terminal facilities in McComb City effectively countermands the effect of the injunction issued by the three-judge District Court. United States of America v. Mayor and Selectmen of McComb City, Civil Action No. 3215, United States District Court, Southern District of Mississippi.

B.

This Court or a judge thereof has the power to suspend, stay and vacate the injunction granted by the court below pending appeal.[1/] Defendants have argued in Part A Supra that under no theory can the injunction granted by the court below be upheld as to defendants as it is predicated upon the conclusion that peaceful enjoinment of rights granted by the Constitution and laws of the United States can be enjoined as a result of violent action in opposition to the exercise of these rights. C.F. Aaron v. Cooper 257 F.2nd. 33, 38, 39 (8th Circuit, 1958), wherein the Court of Appeals reversed the District Court's conclusion that the exercise of constitutional rights could be enjoined due to violent action opposed to said exercise. The time has passed were defendants' rights to travel in interstate commerce, free of segregation, can be questioned. The District Court, therefore, had no discretion to grant the injunction. As Mr. Justice Brandeis said in Union Tool Co. v. Wilson 259 U.S. 107, 112, "Legal discretion... does not extend to refusal to

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1/ Federal rules civil procedure 62(g); 28 U.S.C. Section 1651; Breswick & Co. v. U.S. 100 L. Ed. 1510, 1512, 1513; Shinholt v. Angle 90 F.2nd. 297 (5th Circuit, 1937). Cases cited: Johnson v. Stevenson 335 U.S. 801; C.F. Johnson v. Stevenson 170 F.2nd. 108 (5th Circuit, 1948).

apply well-settled principles of law to a conceded state of facts." 2/

Situation then resolves to this: Prior to injunction issued to the court below, defendants were free to exercise their rights guaranteed and created by the Constitution and laws of the United States, and plaintiff Mayor of the City of Macombe, was enjoined from interfering with the exercise of these rights. The injunction granted below alters this situation by prohibiting defendants use or suggesting use of these terminal facilities. The injunction below, therefore, at conflict with clearly set out precedents in this area alters the status quo wherein defendants were free to enjoy their constitutional rights.

The essential facts in this case are undisputed; the law to be applied is clear; irreparable injunction is established by evidence of a clear and continued deprivation of constitutional rights which would result if the injunction was enforced. Furthermore, the only "irreparable harm" which can be claimed by the plaintiff Mayor of the City of Macombe is identical to his duty to prevent disorder, maintain public peace, and act in accordance with the injunction granted

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2/ This conclusion is reinforced by the order of the three-judge district court in U.S. v. Mayor & Bd. of Selectmen of Macombe City in which the defendants were enjoined from preventing or interfering with the desegregation of the Macombe Terminal facilities.

against him in the case of U.S. v. Mayor & Bd. of Selectmen of Macombe City. Plaintiffs Mr. and Mrs. Aubrey McGehee cannot claim and are not entitled to relief on the ground that they are injured by defendants' conduct. They are injured, if at all, by the violent actions of elements who wish to thwart the exercise of defendants' constitutional rights. It would be ironic, to say the least, to enjoin defendants because of the conduct of those lawless elements who would interfere with them.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

C. H. DOUGLAS, individually and as MAYOR OF THE CITY OF McCOMB CITY, MISSISSIPPI, and MR. AND MRS. AUBREY McGHEE	)	CIVIL ACTION NO. 3223
vs.	)	NOTICE OF APPEAL
THE CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE	)	

NOTICE is hereby given that THE CONGRESS OF RACIAL EQUALITY, the defendant above-named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order granting the motion of the plaintiffs for a preliminary injunction and enjoining the defendant, its officers, agents, servants, employees, attorneys from certain acts, etc. as more fully provided therein, and from each and every part thereof, dated December 22nd, 1961, and filed with the Clerk of this Court on said date.

Dated, New York, January 12th, 1962

Yours, etc.,

CARL RACHLIN
Attorney for Defendant,
The Congress of Racial
Equality
200 Broadway
New York 7, N. Y.

DERRICK A. BELL, ESQ.
10 Columbus Circle
New York, N. Y.

TO:

HON. CHARLES CLARK,
Box 1046, Jackson, Mississippi
Spec. Atty. for McComb City, Miss.
HON. LOUIS ALFORD,
McComb City, Mississippi
HON. WILLIAM A. WILTSHIRE,
McComb City, Mississippi
HON. JOE T. PATTERSON,
Attorney General of the State of Miss.
HON. DUGAS SHANDS and
HON. EDWARD L. CATES,
Assistant Attorneys General of
the State of Mississippi
HON. PETER M. STOCKETT,
Special Assistant Attorney General
of the State of Mississippi

THE FOLLOWING PAGES ARE THE BEST

AVAILABLE.

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IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

C. H. DOUGLAS, Individually, and as Mayor of the City of McComb City, Mississippi, and
MR. AND MRS. AUBREY McJAMERE,
Plaintiffs,
-against-
THE CONGRESS OF RACIAL EQUALITY, INC., JOHN DOE AND MARY DOE,
Defendants.

CIVIL ACTION
NO. 3223

The American Civil Liberties Union, by its attorney, WILLIAM M. KUNSTLER, begs leave to add its voice to the various motions to dismiss, motion for a stay and a three-judge court, motion to dissolve the temporary restraining order and in opposition to the preliminary injunction, and the substantive defenses to plaintiffs' action heretofore raised or interposed by the defendant CONGRESS OF RACIAL EQUALITY, INC.

On November 21, 1961, this court, sitting as a statutory three-judge court ordered the removal of racial signs placed and maintained by the Mayor, the Selectmen and the Chief of Police of McComb City at the Greyhound Bus Terminal in that city. See The United States of America v. the Mayor and Selectmen of McComb City et al, Civil Action No. 3215, Preliminary injunction entered November 27, 1961. This action by this court was based on Paragraph 4 of the regulations promulgated by the Interstate Commerce Commission in Docket No. MC-C-3358, effective November 1, 1961. On December 2, 1961, United States District Judge Sidney C. Mize of this court, signed a temporary restraining order, enjoining The Congress of Racial Equality, Inc., John Doe and Mary Doe "from continuing to sponsor, finance or encourage persons to utilize the terminal facilities located in the City of McComb City, Mississippi, for the transportation of passengers, mail and baggage into, through and from the City of McComb City, Mississippi . . ." Plaintiffs now seek a preliminary injunction containing similar prohibitions.

The American Civil Liberties Union strongly opposes the issuance of the requested preliminary injunction. It seems obvious that plaintiffs' application therefore is just another move in a series of legal maneuvers by the State of Mississippi or political subdivisions thereof to circumvent federally protected rights. If temporary restraining orders and preliminary or permanent injunctions can be freely used in this manner, then important federal rights become little more than mere platitudes.

In addition, the drastic remedy sought by the plaintiffs puts an end of the government against violators. The executive branch has ordered that inter-

state bus terminals, among others, shall be operated on an unsegregated basis. The relief requested by the plaintiffs would, in effect, enjoin persons seeking to exercise and enjoy the unsegregated facilities ordered by the executive branch. In short, the federal judiciary would be preventing the enjoyment of rights granted and guaranteed by another branch of government.

The anomoly of such a course is readily apparent. And, if a preliminary injunction is granted by this court in this instance, there is nothing to prevent similar applications by every municipality in the state. The fact that violence by others might ensue from the entirely lawful conduct of specified defendants is not a ground for injunctive relief. On November 13, 1961, the Supreme Court of the United States refused to sustain a denial by the Commissioner of Parks of the City of New York of a permit for George Lincoln Rockwell, an avowed American Nazi, to speak in Union Square in that city, despite the Commissioner's assertion that violence would surely result if such a permit were issued. It would seem that the Rockwell case cannot be distinguished from the instant situation.

In addition, the Mayor of McComb City has ample means at his disposal to maintain public order. To buttress his own police department, he may request both the state and federal governments to assist him to prevent the speculative violence he has indicated he fears. No such requests have, to our knowledge, been reported in the public press. In fact, the reported violence that has occured in McComb City seems to have taken place, in the main, when the police were conspicuously absent from the areas in which it took place.

If the plaintiffs feel that the federal statutes and administrative orders relating to interstate transportation are unconstitutional or unlawful, there are conventional methods by which such claims can be advanced and litigated. If the activities complained of by the plaintiffs are unlawful and have caused monetary damage, there are adequate remedies at law available to them. The extraordinary relief sought by plaintiffs seems, to say the least, inappropriate at best.

In addition to the above reasons and those advanced by the attorneys for the Congress of Racial Equality, Inc., the American Civil Liberties Unions feels that, in view of the injunction granted by the statutory three-judge court, this cause must be determined by that bench. The granting by this court of a preliminary injunction which would have as its necessary effect the nullification of the action of the three-judge court would make a shambles of our legal system. The plaintiffs' proper forum is the three-judge court where they can make application for a modification of the present preliminary injunction. This court cannot, in effect, overrule the existing preliminary injunction.

WHEREFORE, it is respectfully prayed that plaintiffs' application for a temporary injunction be in all respects denied and that this proceeding be dismissed.

THE AMERICAN CIVIL LIBERTIES UNION
By: William M. Kunstler, it s attorney,
211 Fifth Avenue,
New York 17, N.Y.

Eddie Douglas Jones et al, Appellants

No. 34,313. v. - - - - - Appeal from Harris County

The State of Texas, Appellee

OPINION

The offense is unlawful assembly; the fine as to each of the 18 appellants was $100.00.

At most, the State proved that the 18 accused, some white and some colored, at least one of whom had in his possession a railway ticket entitling him to travel to the State of California, presented themselves at the Union Station restaurant in Houston, which would seat ninety-four patrons and was only partially filled and which was leased from four railroads engaged in interstate commerce and located in the Union Terminal building, with the only entrances opening into the terminal, and seated themselves at the counter and in booths. They were not served because there were members of the colored race among them. There was never any loud talking, noise, communication with other patrons in the establishment, or boisterous or unseemly conduct on the part of any of them. They stand convicted of an unlawful assembly denounced by our Article 448, V.A.P.C., as follows:

> "If the purpose of the unlawful assembly be to prevent any person from pursuing any labor, occupation or employment, or to intimidate any person from following his daily avocation, or to interfere in any manner with the labor or employment of another the punishment shall be by fine not exceeding five hundred dollars."

In the past, this Court has pointed out what acts constitute a violation of this Act. See Ex parte Brachey, 152 S. W. 2d 783.

We must now determine if, under the holding of the Supreme Court of the United States in Garner v. Louisiana, ___ U. S. ___, ___ S. Ct. ___, ___ L. ed. 2d ___, #26, #27, #28, Dec. 11, 1961, the facts stated above constitute any evidence to support these convictions.

We have concluded that they do not, and a reversal of the convictions is necessarily called for. See also Boynton v. Virginia, 364 U. S. 454,

81 S. Ct. 182, 5 L. ed. 2d 206, and Bailey v. Patterson, ___ U. S. ___, ___ S. Ct. ___, ___ L. ed. 2d ___, #643, Feb. 26, 1962.

The judgments are reversed and the causes are remanded.

Morrison, Judge

(Delivered April 4, 1962)

Presiding Judge Woodley dissents.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION
FILE NO. 3223

- X

C. H. DOUGLAS, individually and as MAYOR OF THE CITY OF McCOMB CITY, MISSISSIPPI, and MR. AND MRS. AUBREY McGEHEE

Plaintiffs-Appellees

vs.

THE CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE

Defendants-Appellants

- X

Designation Of Contents Of Record On Appeal

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the defendants-appellants hereby designates for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, taken by notice of appeal filed January 15, 1962, the entire record, transcript of testimony and all proceedings in this action.

Dated, New York, February 21, 1962.

Yours, etc.,

CARL RACHLIN
Attorney for Defendant,
The Congress of Racial Equality
280 Broadway
New York 7, New York

DERRICK A. BELL, ESQ.
10 Columbus Circle
New York, New York

TO: HON. CHARLES CLARK
Box 1046
Jackson, Mississippi
Spec. Atty. for
McComb City, Mississippi

HON. LOUIS ALFORD
McComb City, Miss.

HON. WILLIAM A. WILTSHIRE
McComb City, Mississippi

HON. JOE T. PATTERSON
Attorney General of the
State of Miss.
Jackson, Mississippi

HON. PETER M. STOCKETT,
Special Assistant Attorney
General of the State of Miss.
Jackson, Mississippi

HON. DUGAS SHANDS and
HON. EDWARD L. CATES
Assistant Attorneys General
of the State of Mississippi
Jackson, Mississippi

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

SHIRLEY ROLLER, being duly sworn, deposes and says:

That she is secretary to the attorney for THE CONGRESS OF RACIAL EQUALITY, the defendant above named.

That on the 21st day of February, 1962, she served the within Designation Of Contents Of Record On Appeal pursuant to Rule 75(a) of the Federal Rules of Civil Procedure upon the following persons by depositing true copies of the same securely enclosed in post-paid wrappers in the Post Office Box regularly maintained by the United States Government at 280 Broadway, in said County of New York, directed to said attorneys as follows:

HON. CHARLES CLARK
Box 1046
Jackson, Mississippi
Spec. Atty. for McComb City,

HON WILLIAM A. WILTSHIRE
McComb City, Mississippi

HON. JOE T. PATTERSON,
Attorney General of the
State of Miss.
Jackson, Mississippi

HON. PETER M. STOCKETT,
Special Assistant Attorney
General of the State of Miss.
Jackson, Mississippi

HON. DUGAS SHANDS and
HON. EDWARD L. CATES
Assistant Attorneys General
of the State of Mississippi
Jackson, Mississippi

HON. LOUIS ALFORD,
McComb City, Miss.

that being the addresses within the State designated by them for that purpose upon the preceding papers in this action, or the places where they then kept an office between which places there then was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Sworn to before me this
21st day of February, 1962.

/s/ SHIRLEY ROLLER

SHELDON ENGELHARD
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-1117360 Queens County
Cert. filed in New York County
Term Expires March 30, 1963

UNITED STATES DISTRICT COURT

OFFICE OF THE CLERK

SOUTHERN DISTRICT OF MISSISSIPPI

Jackson, Mississippi
January 17, 1962

COURT TERMS

At Jackson—First Mondays in May and November.
At Vicksburg — Third Mondays in May and November.
At Biloxi — Third Monday in February and First Monday in June.
At Meridian — Third Mondays in March and September.
At Hattiesburg — Second Mondays in April and October.

JAN 1 7 1962
VLADECK & ELIAS

Mr. Carl Rachlin
Vladeck and Elias
Attorneys at Law
280 Broadway
New York, N.Y.

Re: Douglas et al v. Core
Civil Action 3223-Jackson

Dear Mr. Rachlin:

This will acknowledge receipt of Notice of Appeal and affidavit of service in the above entitled case enclosed in your letter of January 12th. We have collected the fee of $5.00 for the filing of the Notice of Appeal from Mr. Derrick Bell.

Your attention is called to Rule 73(c) of Federal Rules requiring Bond on Appeal.

Please let us have your Designation of Record on Appeal and advise whether or not the appeal will be on the original papers or will follow the normal course of having the record printed. The Clerk's office can have this record printed for you in mimeograph form if you should desire that we do so. Based upon the entire file the estimated number of pages would be 275 and the total estimated cost would be $550.00, which amount would be payable in advance.

This fee includes services such as the securing of necessary orders for extension of time or sending up original exhibits, the submission of the required number of copies of the record to the Court of Appeals for filing, the service of the required number of copies of the record upon opposing counsel as called for by the Rules of the Court of Appeals for this Circuit, etc., so that you need not have to worry about these details.

Very truly yours,

Loryce E. Wharton, Clerk

E. Mathison

(Mrs.) Elizabeth Mathison
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE
JACKSON DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI

C. H. DOUGLAS, individually and as Mayor of the CITY OF McCOMB CITY, MISSISSIPPI, and MR. and MRS. AUBREY McGEHEE

V. CIVIL ACTION NO. 3223

THE CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAR 30 1962
Loryce E. Wharton, Clerk
By
Deputy

ORDER EXTENDING TIME TO FILE APPEAL RECORD

It being made to appear to the Court that an appeal has been prosecuted in the above styled case and that the Clerk has not had sufficient time in which to file the transcript of the record in the Court of Appeals and that the time should be extended, for good cause shown it is therefore ordered by the Court that the time for filing the record upon appeal and docketing the action in the Court of Appeals be and the same hereby is extended to May 1, 1962.

ORDERED, this the 26 day of March, 1962.

BEN F. CAMERON

UNITED STATES CIRCUIT JUDGE

CR

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
DEC 22 1961
Loryce E. Wharton, Clerk
By
Deputy

C. H. DOUGLAS, Individually, and as Mayor of the City of McComb City, Mississippi, and MR. & MRS. AUBREY McGEHEE,

PLAINTIFFS

vs.

NO.3223

THE CONGRESS OF RACIAL EQUALITY, JOHN DOE AND MARY DOE,

DEFENDANTS

PRELIMINARY INJUNCTION

This cause came on to be heard before this Court on the 6th day of December, 1961, on the motion of C. H. Douglas, individually and as Mayor of the City of McComb City, Mississippi, and Mr. and Mrs. Aubrey McGehee, Plaintiffs, for a Preliminary Injunction heretofore filed in this cause on the 2nd day of December, 1961, supported by the verified Complaint, the affidavit of William A. Wiltshire, attached to said Plaintiffs' Motion for a temporary restraining order, and oral testimony and documentary proof; and the Court having heard and considered all of same and having heard and considered oral argument and written briefs of counsel for Plaintiffs and Defendants, and being fully advised in the premises, is of the opinion and finds:

(1) That this Court has full jurisdiction of the subject matter and the parties;

(2) That immediate and irreparable loss, injury and damages will result to the Plaintiffs, consisting of widely publicized breaches of the peace and good order in the City of McComb City, Mississippi, if this preliminary injunction does not issue;

(3) That members of CORE-Congress of Racial Equality have advertised and publicized in advance that they intended to send groups of persons into the City of McComb City, Mississippi at particular times and places to test the tempers and reactions of individual citizens of said city and that said member groups have, indeed, arrived at the terminal facilities maintained in said city for the regular transportation in, to and through said city in intrastate and interstate commerce and groups of said local citizens were thereby caused to gather at and near said facilities, together with out-of-town reporters and press, newsreel and television photographers, who also immediately congregated in and near said facilities after the announcement of said groups' plans and intentions;

(4) That on one occasion the members of said Defendant CORE-Congress of Racial Equality mislead the police officials of said City of McComb City as to the timing of their plans to utilize said facilities, so that they could arrive at said facilities while such local groups of citizens and outside news reports and photographers were present but in the tricked absence of such police officials, who were in good faith attempting to keep the peace, and that on such occasion the group of defendant members spoke rudely and loudly to the bus terminal proprietors with the deliberate intent of provoking a breach of the peace or incident of violence, which did occur, and was promptly recorded and broadcast by the waiting news personnel, one of whom actively assisted in the provocation of such incident;

(5) That these acts and actions were taken by the members of the Defendant, CORE-Congress of Racial Equality, for the purpose of securing for themselves notoriety and publicity and publicity designed to further their own ends and aims of self-aggrandizement and promotion and not in any proper interest in bona fide exercises of the rights of usual, normal

or non-discriminatory travel in intrastate or interstate commerce;

(6) That, unless enjoined, such acts and actions are likely to recur;

(7) That no citizen or group of citizens or the Defendant Corporation CORE-Congress of Racial Equality has any vested right to violate the valid law of the State of Mississippi or to deliberately provoke others to breach the peace or create violence, on the basis of the facts related above, while merely incidentally exercising rights vested in those having the status of traveller in interstate or intrastate commerce;

(8) That this Court should exercise the discretion vested in it to enjoin the said CORE-Congress of Racial Equality, and its officers, agents, servants, employees and attorneys and those persons in active concert or participation with them, from any further sponsorship, or encouragement of such publicized agitation for the ends and purposes described.

IT IS, THEREFORE, ORDERED AND ADJUDGED:

That the Defendant, CORE-Congress of Racial Equality, and its officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of this order, by personal service or otherwise, be and they are hereby enjoined from sponsoring, encouraging or financing persons to utilize the terminal facilities located in the City of McComb City, Mississippi, for the transportation of passengers, mail and baggage into, through and from the said City of McComb, Mississippi, for the purpose of fomenting violence or provoking breaches of the peace in or near said terminal facilities; or for such purpose after having publicized their purposes and intentions

to so utilize or misuse such facilities; or for the purpose of creating or securing unto themselves notoriety and publicity, as the sponsoring organization of such fomentation and provocation; or for the purpose of testing the tempers and reactions of the local citizens of said City in the absence of local police protection.

There is expressly excluded from the operation of this injunction any impingement upon the normal, usual or ordinary travel of any person in interstate or intrastate commerce to, through or from the City of McComb City, Mississippi, and this order is intended to be and is limited to the utilization of said terminal facilities for the purposes aforesaid only.

ORDERED AND ADJUDGED, this 22 day of December, 196 1.

/s/ Harold Cox

U. S. DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY.
LORYCE E. WHARTON, CLERK
BY: L. E. Wharton
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

NOVEMBER 1963 TERM

COURT CALENDAR

Sufficient advanced notice is given to these settings to enable the attorneys to be ready for trial on the dates set. Any absolutely unavoidable conflict, of course, will be respected, but your cooperation in disposing of these cases at the appointed time will be expected and will be very much appreciated.

10-8-63

Harold Cox
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

COURT CALENDAR

WEDNESDAY, NOVEMBER 13, 1963

No. 2850 - Civil

Humble Oil & Refining Co., et al	Joe A. Thompson Box 1368, Hattiesburg, Miss. C. C. Richmond & James Boone P. O. Box 1269, Jackson, Miss. Charles B. Wallace, c/o Brunini, Everett, Grantham & Quin (E. L. Brunini) P. O. Box 119, Jackson, Miss. John T. Armstrong Bank of Hazlehurst, Bldg. Hazlehurst, Miss. Wells, Thomas & Wells (W. Calvin Wells, III) P. O. Box 158, Jackson, Miss. M. M. Roberts P. O. Box 870 Hattiesburg, Miss. R. T. Carlisle c/o Gulf Oil Corporation Petroleum Bldg., Jackson, Miss.
vs.	
Dexter Barr, Chairman, State Tax Commission of the State of Mississippi Pan American Petroleum, Intervenor Texas Gulf Producing Co., Intervenor Union Producing Co., Intervenor	Joe T. Patterson, Atty. Genl. New Capitol Bldg., Jackson, Miss. John E. Stone 4212 Brookdale, Jackson, Miss. Henley, Jones & Henley (Charles B. Henley) P.O. Box 326, Jackson, Miss. Simrall, Aultman & Pope (James Simrall, Jr.) 411 Carter Bldg., Hattiesburg, Miss. C. Ford Currier, O. L. Hasty & Riley B. Fell P. O. Box 1129, Shreveport, La. Heidelberg, Woodliff, & Franks (Kenneth I. Franks) 690 1st Nat'l Bank Bldg. Jackson, Miss.

Filed: 1-16-59 Suit for Declaratory Judgment

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No. 2852 - Civil

Willmut Gas & Oil Co.

deQuincy V. Sutton
Threefoot Bldg. Meridian, Miss.
Green, Green & Cheney
(Reynolds Cheney)
P. O. Box 1666, Jackson, Miss.

vs.

J. L. Enochs, District Director of Internal Revenue District of Mississippi

U. S. Attorney
(E. R. Holmes)

Filed: 2-5-59 Refund of Income Tax

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No. 2874 - Civil

Willmut Gas & Oil Co.

Green, Green & Cheney
(Garner W. Green)
P. O. Box 1666, Jackson, Miss.
deQuincy V. Sutton
Threefoot Building
Meridian, Miss.

vs.

J. L. Enochs, District Director, Internal Revenue, District of Mississippi

U. S. Attorney

Filed: 4-21-59 Refund of Income Tax

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No. 2886 - Civil

Atwell Transfer Co.

Rushing & Guice
(Jacob D. Guice)
P. O. Box 153, Biloxi, Miss.

vs.

Norman A. Johnson, Jr., et al

Joe T. Patterson, Atty. Genl.
New Capitol Building
Jackson, Miss.
Wright, Overstreet, Kuykendall & Perry (Robert E. Perry)
P. O. Box 961, Jackson, Miss.

Filed: 6-17-59 Motion for Injunction

THREE JUDGE COURT
(For Announcement ONLY)

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No. 2940 - Civil

United States of America — U. S. Attorney

vs.

Emile Kalil, Sr., et al — Forrest B. Jackson
P. O. Box 124, Jackson, Miss.
deQuincy V. Sutton
Dixie Towers, Meridian, Miss.
John E. Stone
4212 Brookdale, Jackson, Miss.

Filed: 1-18-60 Internal Revenue Code of 1954 Tax Lien

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No. 2954 - Civil

Zero Manufacturing Co., Inc. — Young & Young (James L. Young)
1540 Dep. Gty. Bank Bldg.
Jackson, Miss.
Mason, Mason & Albright
(John M. Mason)
708 Perpetual Bldg.
Washington 4, D. C.

vs.

Mississippi Milk Producers Assn. — McIntyre & McIntyre
(W. E. McIntyre, Jr.)
Brandon, Miss.
Kingsland, Rogers & Ezell
(John T. Rogers)
7912 Bonhomme Ave.
St. Louis 5, Mo.

Filed: 3-2-60 Patent Infringment

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No. 2990 - Civil

The Fidelity & Casualty Co., of New York

Watkins & Eager
(William E. Suddath)
P. O. Box 650, Jackson, Miss.
Byrd, Wise & Smith
(William O. Carter, Jr.)
P. O. Box 157, Jackson, Miss.
Wells, Thomas & Wells
(W. Calvin Wells)
P. O. Box 158, Jackson, Miss.

vs.

W. S. Corley, Jr., et al

L. D. Pittman
Raleigh, Miss.

Filed: 6-13-60 Contract Default

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No. 3001 - Civil

David C. Elliott, et al

Bernard W. N. Chill
P. O. Box 1482
Jackson, Miss.

vs.

Hinds Chemical Co., Inc., et al

Young & Young
(James L. Young)
1540 Dep. Gty. Bank Bldg.
Jackson, Miss.
Ben H. Walley
1111 Dep. Gty. Bank Bldg.
Jackson, Miss.

Filed: 7-5-60 Sale of stock in vio. of Securities Act of 1933

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WEDNESDAY, NOVEMBER 13, 1963 Continued

No. 3019 - Civil

United States of America	U. S. Attorney
vs.	
Mrs. Hallie Stirling Tighe, et al	Crisler, Crisler & Bowling (Alfred N. Crisler) 431 Tombigbee St. Jackson, Miss. E. B. Todd 429 Tombigbee St. Jackson, Miss. W. E. Gore, Jr. P. O. Box 186 Jackson, Miss. Tighe & Tighe (B. Stirling Tighe) 416 Plaza Bldg. Jackson, Miss.

Filed: 8-23-60 Interpleader - Insurance Policy

CONSOLIDATED

No. 3219 - Civil

Mrs. Betty Hallie Stirling Roecker, et al	Alfred N. Crisler 431 Tombigbee St. Jackson, Miss. W. E. Gore, Jr. P. O. Box 186 Jackson, Miss.
vs.	
Mrs. Hallie Stirling Tighe	B. Stirling Tighe 416 Plaza Bldg. Jackson, Miss.

Filed: 11-15-61 Interpleader - Insurance Policy

Removed from Chancery Court of the First Judicial District of Hinds County

No. 3039 - Civil

United States of America — U. S. Attorney

vs.

Lee Seed & Feed Co., Troy
L. Lee & Moselle C. Lee — Roy N. Lee
Box 115, Forrest, Miss.

Filed: 10-11-60 Overpayment of Claim

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THURSDAY, NOVEMBER 14, 1963

No. 3058 - Civil

Tennessee Gas Transmission Co. a corp. & Brown & Root Inc., a corp.

Proctors for Libelant:
Dan H. Shell
P. O. Box 1172, Jackson, Miss.
Lord, Bissell & Brook
135 S. LaSalle St.
Chicago 3, Ill.

vs.

J. Ray McDermott & Co., Inc. a corp.

(Suit in personam)

Forrest B. Jackson
P. O. Box 124
Jackson, Miss.
Robert B. Acomb, Jr.
1547 Nat'l Bank of Commerce Bldg., New Orleans 12, La.

Filed: 11-23-60 Damages

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No. 3068 - Civil

William L. Higgs, et al

William L. Higgs
Box 4863, Jackson, Miss.

vs.

The Citizens Council Forum, et al

Wells, Thomas & Wells
(Earl Thomas)
P. O. Box 158, Jackson, Miss.
Satterfield, Shell, Williams & Buford (Dan H. Shell)
P. O. Box 1172, Jackson, Miss.
Butler, Snow, O'Mara, Stevens & Cannada (Robert C. Cannada)
P. O. Box 1250, Jackson, Miss.
Joe T. Patterson, Atty. Genl.
New Capitol Bldg.
Jackson, Miss.

Filed: 1-7-61 Civil Rights

THREE JUDGE COURT

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No. 3077 - Civil

Colonial Sugars Co., a corp.	Montgomery, Barnett, Brown & Read National Bank of Commerce Bldg., New Orleans, La. Simrall, Aultman & Pope (Bruce C. Aultman) 411 Carter Bldg. Hattiesburg, Miss.
vs.	
Seago, Inc., a corp., & D. G. Seago, Jr.	Joe N. Pigott 109 N. Broadway McComb, Miss.

Filed: 1-27-61 Debt

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No. 3088 - Civil

United States of America for the use of Westinghouse Electric Corporation	Wells, Thomas & Wells (Jack W. Brand) Box 158, Jackson, Miss. Jones, Bird & Howell (Eugene T. Branch) 4th Floor Haas-Howell Bldg. Atlanta 3, Georgia
vs.	
G. E. Bass & Co., Inc., et al	Snow, Covington & Shows (J. A. Covington) P. O. Box 786 Meridian, Miss. Butler, Snow, O'Mara, Stevens & Cannada (Roger C. Landrum) P.O. Box 1250, Jackson, Miss.

Filed: 2-28-61 Contract Default

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No. 3093 - Civil

Charles M. Wright, et al

Courtney & Echols
(H. A. Courtney)
709 Dep. Gty. Bank Bldg.
Jackson, Miss.
Anthony A. Tattis
P. O. Box 235, Jackson, Miss.

vs.

United States of America

U. S. Attorney

Filed: 3-8-61 Income Taxes

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No. 3097 - Civil

Barnwell Drilling Co., Inc., et al

R. M. Nichols
P. O. Box 1748
Shreveport, La.
Milton H. Anders
P. O. Box 1748
Shreveport, La.
Forrest B. Jackson
P. O. Box 124, Jackson, Miss.

vs.

Sun Oil Co.

Heidelberg, Woodliff & Franks
1012 1st Nat'l Bank Bldg.
Jackson, Miss.
Edwin M. Cage
P. O. Box 2880, Dallas 21, Tex.

Filed: 3-13-61 Preliminary & Permanent Injunction

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No. 3107 - Civil

Securities Investment Co.

Cox, Dunn & Clark
(William H. Cox, Jr.)
P. O. Box 1046
Jackson, Miss.

vs.

Joe M. Taylor, d/b/a
Taylor Motor Co.

W. E. Gore, Jr.
P. O. Box 186, Jackson, Miss.

Filed: 4-6-61 Judgment

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No. 3172 - Civil

Stribling Bros. Machinery Co., a Corporation

Paul M. Newton
2414 14th Street
Gulfport, Miss.

vs.

United States of America

U. S. Attorney

Filed: 8-24-61 Recovery

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No. 3175 - Civil

Hyde Construction Co., Inc.

Cox, Dunn & Clark
P. O. Box 1046
Jackson, Miss.

vs.

Koehring Co., et al

Roger C. Landrum
P. O. Box 1250
Jackson, Miss.
William A. Denny
John F. Friedle
P. O. Box 3112
Milwaukee, Wis.

ON APPEAL

Filed: 8-30-61 Suit for Declaratory Judgment and Writs of Chancery attachments

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No. 3177 - Civil

Willmut Gas and Oil Co.

deQuincy V. Sutton
214 Dixie Towers Bldg.
Meridian, Miss.
Green, Green & Cheney
(Garner W. Green)
P. O. Box 1666, Jackson, Miss.

vs.

J. L. Enochs, District Director of Internal Revenue, etc.

U. S. Attorney

Filed: 9-15-61 Recovery of Income Tax

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MONDAY, NOVEMBER 18, 1963

No. 3188 - Civil

Irby Charping, Petitioner

Brunini, Everett, Grantham
& Quin (C. Delvert Hoseman)
P. O. Box 991, Vicksburg, Miss.

vs.

J. L. Enochs, District Director of Internal Revenue, Respondent

U. S. Attorney

Filed: 9-21-61 Temporary Restraining Order, Permanent Injunction

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No. 3212 - Civil

Rance Ratcliff, et al

Allen & Patterson
(Emmette P. Allen)
Brookhaven, Miss.
Breed O. Mounger
P. O. Box 245,
Tylertown, Miss.

vs.

Sun Oil Co., et al

Wells, Thomas & Wells
(Erskine Wells)
P. O. Box 158, Jackson, Miss.
John T. Armstrong
P. O. Box 429
Hazlehurst, Miss.
R. Pearce Phillips
P. O. Box 786
Brookhaven, Miss.
E. M. Cage
Box 2880, Dallas, Texas

Filed: 10-27-61 Property Damages

Removed from Chancery Court of Lincoln County, Miss.

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No. 3215 - Civil

United States of America — U. S. Attorney
St. John Barrett
Dept. of Justice
Washington, D. C.

vs.

The Mayor and Selectmen of McComb City, et al — William A. Wiltshire
P. O. Box 1061
McComb, Miss.
Louis Alford
P. O. Box 8, McComb, Miss.
Cox, Dunn & Clark
(Charles Clark)
P.O. Box 1046, Jackson, Miss.

Filed: 11-2-61 Civil Rights. Motion for Temporary Restraining Order and Preliminary Injunction

THREE JUDGE COURT
(For announcement ONLY)

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No. 3221 - Civil

Ella Hamilton Perkins — Tighe & Tighe
(B. Stirling Tighe)
416 Plaza Building
Jackson, Miss.

vs.

United States of America — U. S. Attorney

Filed: 11-22-61 Judgment - Insurance Policy

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file Douglas

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MONDAY, NOVEMBER 18, 1963 Continued

No. 3223 - Civil

C. H. Douglas, et al	Norman Gillis, Jr. P. O. Box 264, McComb, Miss. Joe T. Patterson, P. M. Stockett, Jr., Dugas Shands, and Charles Clark New Capitol Bldg., Jackson, Miss. Louis Alford P. O. Box 8, McComb, Miss. William A. Wiltshire P. O. Box 1061 McComb, Miss.
vs.	
The Congress of Racial Equality, et al	Carl Rachlin 280 Broadway, New York, N. Y. Derrick A. Bell 10 Columbus Circle New York 19, N. Y. OF COUNSEL: Jack Greenberg Wiley Branton & James M. Nabrit, III

ON APPEAL

Filed: 12-2-61 Civil Rights

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No. 3230 - Civil

Arthur J. Goldberg, Sec. of Labor, U. S. Dept. of Labor	Charles Donahue, Solicitor; Beverley R. Worrell Regional Attorney: Edwin G. Salyers, Attorney, Office of the Solicitor, U. S. Dept. of Labor, 1401 S. 20th St. Birmingham 5, Alabama
vs.	
Mississippi Publishers Corp., et al	Watkins, Pyle, Edwards & Ludlam (John H. Stennis) P. O. Box 427, Jackson, Miss.

Filed: 12-30-61 Suit for permanent injunction from violation of the Fair Labor Standards Act of 1938 as amended

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MONDAY, NOVEMBER 18, 1963 Continued

No. 3235 - Civil

Rev. L. A. Clark et al

Jack H. Young
207 Redmond Bldg.
Jackson, Miss.
Robert L. Carter and
Maria L. Marcus
20 W. 40th Street
New York 18, New York

vs.

Allen C. Thompson, et al

Thomas H. Watkins
P. O. Box 650
Jackson, Miss.
E. W. Stennett, City Atty.
Jackson, Miss.

ON APPEAL

Filed: 1-12-62 Civil Rights

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TUESDAY, NOVEMBER 19, 1963

No. 3247 - Civil

United States of America

St. John Barrett
Department of Justice
Washington, D. C.
Bernard A. Gould, I.C.C.
Washington, D. C.

vs.

City of Jackson, et al

Thomas H. Watkins
P. O. Box 650, Jackson, Miss.
E. W. Stennett, City Attorney
Jackson, Miss.
Butler, Snow, O'Mara, Stevens
& Cannada
P. O. Box 1250, Jackson, Miss.

Filed: 2-19-62 Civil Rights

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No. 3260 - Civil

Wan Corporation

Ward & Mestayer
(Thomas R. Ward)
P. O. Box 3125
Meridian, Miss.

vs.

James L. Enochs, District Director of Internal Revenue, etc.

U. S. Attorney

Filed: 3-30-62 Recovery of Income Tax

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No. 3261 - Civil

Wan Corporation

Ward & Mestayer
(Thomas R. Ward)
P. O. Box 3125
Meridian, Miss.

vs.

James L. Enochs, District Director of Internal Revenue, etc.

U. S. Attorney

Filed: 3-30-62 Recovery of Income Tax

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No. 3262 - Civil

Wan Corporation

Ward & Mestayer
(Thomas R. Ward)
P. O. Box 3125
Meridian, Miss.

vs.

James L. Enochs, District Director of Internal Revenue, etc.

U. S. Attorney

Filed: 3-30-62 Recovery of Income Tax

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No. 3264 - Civil

Empire Gas Engineering Co.

Bob Ray
P. O. Box 1449, Jackson, Miss.
James Grizzard
Suite 312 Title Bldg.
30 Pryor, Atlanta 3, Ga.

vs.

The Western Casualty and Surety Co.

Cox, Dunn & Clark
(Vardaman S. Dunn)
P. O. Box 1046
Jackson, Miss.

Filed: 4-6-62 Default of subcontractors performance bond

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No. 3272 - Civil

American Olean Tile Co.

Watkins & Eager
(Elizabeth Grayson)
P. O. Box 650, Jackson, Miss.

vs.

Hudson Speed, et al

Cox, Dunn & Clark
(Vardaman S. Dunn)
P. O. Box 1046
Jackson, Miss.

Filed: 5-11-62 Bill of Discovery and Cancellation of Warranty Deed

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No. 3273 - Civil

Otis B. Casanova, et ux

Brunini, Everett, Grantham & Quin (C. Delbert Hosemann)
P. O. Box 991, Vicksburg, Miss.

vs.

James L. Enochs, District Director of Internal Revenue, etc.

U. S. Attorney

Filed: 5-12-62 Recovery of Income Tax

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No. 3290 - Civil

United States of America — U. S. Attorney

vs.

An article of drug consisting of 250 30-tablet bottles, more or less...labeled in part: "***Alfa-Lite Concentrated Alfalfa Extract..., etc. — Percy Stanfield, Jr., Suite 520-522 Plaza Bldg., Jackson, Miss.

Filed: 6-28-62 Federal Food, Drug and Cosmetic Act

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No. 3303 - Civil

United States of America — U. S. Attorney

vs.

Kramer Service, Inc. — Louis Alford, P. O. Box 8, McComb, Miss.

Filed: 8-3-62 Breach of Contract

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No. 3304 - Civil

United States of America — U. S. Attorney

vs.

Magnolia Compress Co., et al — O. W. Phillips, P.O. Box 501, Magnolia, Miss.

Filed: 8-3-62 Breach of Contract

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No. 3305 - Civil

United States Fidelity & Guaranty Co.	Butler, Snow, O'Mara, Stevens & Cannada (Roger Landrum) P. O. Box 1250, Jackson, Miss.
vs.	
The Western Casualty & Surety Co.	Cox, Dunn & Clark (Vardaman S. Dunn) P. O. Box 1046 Jackson, Miss.

Filed: 8-8-62 Determination of liability under terms of insurance policy

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No. 3340 - Civil

W. Willard Wirtz, Sec. of Labor, U. S. Dept. of Labor	Charles Donahue, Beverley R. Worrell, Reuben S. Haslam Office of the Solicitor U. S. Dep. of Labor 1401 S. 20th St. Birmingham, Alabama
vs.	
Leo R. McGehee and Leo E. McGehee	Butler, Snow, O'Mara, Stevens & Cannada (Thomas Prewitt) P. O. Box 1250, Jackson, Miss.

Filed: 11-28-62 Vio. Fair Labor Standards Act of 1938 as amended

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No. 3345 - Civil

Marie Barette, et al	Rosenthal & Rosenthal (Leonard Rosenthal) P. O. Box 4863, Jackson, Miss. William L. Higgs P. O. Box 4863, Jackson, Miss.
vs.	
Milner Enterprises, Inc.	Butler, Snow, O'Mara, Stevens & Cannada (Thomas Prewitt) P. O. Box 1250, Jackson, Miss.

Filed: 12-10-62 Vio. Fair Labor Standards Act

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No. 3346 - Civil

Mrs. Mildred Triplett, Admrx. of the Estate of William Charles Wagner, Deceased	Aaron L. Ford 609 Plaza Bldg. Jackson, Miss.
vs.	
The United States of America	U. S. Attorney
vs.	
Ray Ainsworth - Respondent-Impleader	Watkins & Eager (James A. Becker, Jr.) P. O.Box 650, Jackson, Miss.

Filed: 12-10-62 Federal Tort Claim - Admiralty Suit - Personal Injury

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No. 3347 - Civil

In Re: H. K. Whittington, Circuit Clerk, & Registrar Amite County, Mississippi	Burke Marshall, Asst. Atty. Genl.; Robert E. Hauberg U. S. Attorney, Jackson, Miss., John Doar & Gordon A. Martin, Jr., Dept. of Justice, Washington, D. C. T. F. Baden, Liberty, Miss. Joe D. Gordon, Liberty, Miss. Joe T. Patterson, Atty. Genl. of the State of Mississippi & William A. Allain, Asst. Atty. Genl., State of Miss., New Capitol Bldg., Jackson, Miss.

Filed: 12-10-62

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No. 3365 - Civil

Church Building & Savings Association

Sullivan, Sullivan & Keyes
(C. Arthur Sullivan)
P. O. Box 1381
Jackson, Miss.

vs.

J. L. Enochs, District Director of Internal Revenue, etc.

U. S. Attorney

Filed: 1-28-63 Recovery of Income Tax

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No. 3366 - Civil

Imperial Records, Inc.

Satterfield, Shell, Williams & Buford (Dan H. Shell)
P. O. Box 1172, Jackson, Miss.

vs.

Ace Record Co., Inc., a Corp., et al

Sullivan, Sullivan & Keyes
(Earl Keyes)
P. O. Box 1381, Jackson, Miss.

Filed: 1-29-63 Suit for Injunction - Contract Default

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No. 3369 - Civil

G. E. Bass & Company, Inc.

Snow, Covington, Shows & Watts (J. A. Covington)
P. O. Box 786
Meridian, Miss.

vs.

National Union Indemnity Co.

Butler, Snow, O;Mara, Stevens & Canada(Roger C. Landrum)
P. O. Box 1250, Jackson, Miss.

Filed: 2-1-63 Contract Default

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THURSDAY, NOVEMBER 21, 1963

No. 3371 - Civil

W. Willard Wirtz, Secretary of Labor, U. S. Dept. of Labor

Beverley R. Worrell
Regional Attorney
Office of the Solicitor
U. S. Dept. of Labor
1401 S. 20th Street
Birmingham, Ala.

vs.

Graves Lumber Co., et al

Henley, Jones & Henley
(W. S. Henley)
P. O. Box 509
Hazlehurst, Miss.

Filed: 2-11-63 Fair Labor Standards Act of 1938, as amended

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No. 3372 - Civil

Isaac E. Watkins

Laurel G. Weir
P. O. Box 156
Philadelphia, Miss.

vs.

Anthony J. Celebrezze, Sec. of Health, Education and Welfare

U. S. Attorney

Filed: 2-11-63 Complaint for Review

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No. 3374 - Civil

W. Willard Wirtz, Secretary of Labor, U. S. Dept. of Labor

Charles Donahue, Solicitor
Beverley R. Worrell, Regional Atty. Hubert E. Owens,
Office of the Solicitor,
U. S. Dept. of Labor
1401 S. 20th St.
Birmingham 5, Ala.

vs.

Mississippi Drug Company, Inc.

Wells, Thomas & Wells
(Joe Jack Hurst)
P. O. Box 158, Jackson, Miss.

Filed: 2-15-63 Vio. Fair Labor Standards Act of 1938, as amended

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No. 3377 - Civil

Peerless Insurance Co.

Bob Ray
P. O. Box 1449, Jackson, Miss.

vs.

D. O. Penick, et al

Satterfield, Shell, Williams & Buford (K. Hayes Callicutt)
P. O. Box 1172, Jackson, Miss.
James L. Spencer
Suite 523, Plaza Bldg.
Jackson, Miss.
William F. Goodman, Jr.
P. O. Box 650, Jackson, Miss.
Watkins & Eager
(Elizabeth Grayson)
P. O. Box 650, Jackson, Miss.
Butler, Snow, O'Mara, Stevens & Canada (Junior O'Mara)
P. O. Box 1250, Jackson, Miss.
Cox, Dunn & Clark
P. O. Box 1046, Jackson, Miss.

Filed: 2-25-63 Petition for Declaratory Judgment

- - - - - - - - - - - - - - - - -

No. 3378 - Civil

William L. Haas, et al

Manning S. Green
22650 Van Dyke Ave.
Warren, Michigan
L. O. Smith, Jr.
1126 1st Nat'l Bank Bldg.
Jackson, Miss.

vs.

J. L. Enochs, District Director of Internal Revenue, etc.

U. S. Attorney

Filed: 3-1-63 Recovery of Income Tax

- - - - - - - - - - - - - - - - -

No. 3381 - Civil

Shapiro, Bernstein & Co., Inc., et al	Cox, Dunn & Clark (Charles Clark) P. O. Box 1046 Jackson, Miss.
vs.	
Broadcasters Service, Inc.	Francis T. Zachery 206 Carter Bldg. Hattiesburg, Miss.

Filed: 3-6-63 Infringement of Copyright

- - - - - - - - - - - - - - - - -

No. 3383 - Civil

Milner Enterprises, Inc.	Butler, Snow, O'Mara, Stevens & Cannada (R. C. Landrum) (George H. Butler) P. O. Box 1250, Jackson, Miss.
vs.	
United States of America	U. S. Attorney

Filed: 3-11-63 Recovery of Income Taxes

- - - - - - - - - - - - - - - - -

No. 3386 - Civil

W. E. Zeigler	Osborn G. Idom and O. B. Triplett, Jr. Forrest, Miss.
vs.	
Roy Gaddis, Jr., et al	Carter & Mitchell (Edward L. Cates) P. O. Box 1582 Jackson, Miss.

Filed: 3-12-63 Suit to Recover under contract for sale and lease agreement

Removed from Chancery Court, Scott County, Miss.

- - - - - - - - - - - - - - - - -

MONDAY, NOVEMBER 25, 1963

No. 3389 - Civil

W. M. Carter, et al — Creekmore & Beacham (L. L. Beacham) 822 Plaza Bldg. Jackson, Miss.

vs.

James L. Enochs, District Director of Internal Revenue — U. S. Attorney

Filed: 3-12-63 Recovery of Income Tax

- - - - - - - - - - - - - - - -

No. 3392 - Civil

I. E. Ballard — R. C. Edwins, Box F, Kentwood, La.; Burrell J. Carter, Greensburg, La.; John W. Capers, 611 Barnett Bldg. Jackson, Miss.

vs.

Great Southern Wirebound Box Factory — Daniel, Coker & Horton (Melvin B. Bishop) P. O. Box 1084, Jackson, Miss.

Filed: 3-21-63 Personal Injury - Motor Vehicle

- - - - - - - - - - - - - - - -

No. 3393 - Civil

Mrs. Annie Pearl Cooper — J. E. Smith, P. O. Box 387, Carthage, Miss.

vs.

United States of America — U. S. Attorney

Filed: 3-22-63 Personal Injury - Motor Vehicle

- - - - - - - - - - - - - - - -

No. 3394 - Civil

John V. Covington, Jr.

Pyles & Tucker
(Dixon L. Pyles)
507 East Pearl
Jackson, Miss.

vs.

Covington Cadillac Company, Inc.

Dent, Ward, Martin & Terry
(J. B. Terry)
Vicksburg, Miss.
Butler, Snow, O'Mara, Stevens & Cannada (Roger C. Landrum)
P. O. Box 1250, Jackson, Miss.

Filed: 3-23-63 Declaratory Judgment

- - - - - - - - - - - - - - - - -

No. 3395 - Civil

El Dorado Poultry By-Products Co.

Satterfield, Shell, Williams & Buford (K. Hayes Callicutt)
Box 1172, Jackson, Miss.
Norman H. Gerlach
105 W. Adams St.
Chicago 3, Illinois

vs.

A.B.C. Rendering of San Antonio, Inc., and Sanderson Farms, Inc.

Filed: 3-28-63 Patent Infringment

- - - - - - - - - - - - - - - - -

No. 3396 - Civil

Mrs. Helen Idell Grice

John Gregg, David A. Harris
P. O. Box 1583, Jackson, Miss.

vs.

Liberty Cash Grocers, Inc., et al

William Liston
Purnell Bldg., Winona, Miss.
Satterfield, Shell, Williams & Buford (Cary E. Bufkin)
P. O. Box 1172, Jackson, Miss.

Filed: 4-1-63 Personal Injury

- - - - - - - - - - - - - - - - -

No. 3398 - Civil

Larry Michael Dugan

J. A. Travis, Jr.
P. O. Box 807, Jackson, Miss.
Pritchard & Eaton
P. O. Box 942, Jackson, Miss.
Scales & McDaniel
Oklahoma City, Okla.

vs.

Yazoo Manufacturing Co.
& Yazoo Sales Co.

Butler, Snow, O'Mara, Stevens
& Cannada (Junior O'Mara)
P. O. Box 1250, Jackson, Miss.

Filed: 4-16-63 Personal Injury

- - - - - - - - - - - - - - - - -

No. 3399 - Civil

Marvin Davis

J. A. Travis, Jr.
P. O. Box 807, Jackson, Miss.
Travis, McKee & Franck
(Lawrence J. Franck)
P. O. Box 995, Jackson, Miss.

vs.

Samuel Palmer Drury

Filed: 4-17-63 Personal Injury - Motor Vehicle

- - - - - - - - - - - - - - - - -

No. 3400 - Civil

Coastal Chemical Corp.

Satterfield, Shell, Williams
& Buford (John C. Satterfield)
P.O. Box 466
Yazoo City, Miss.

vs.

Filtrol Corporation

Wells, Thomas & Wells
(Earl T. Thomas & Erskine
Wells) P. O. Box 158
Jackson, Miss.

Filed: 4-18-63 Breach of Letter Contract

- - - - - - - - - - - - - - - - -

ABSTRACT OF FACTS

FACTS:

On Monday, November 27th, 1961, a preliminary injunction was entered in Civil Action # 3215 before a statutory three Judge Federal Court, sitting in the Southern District of Mississippi. The order enjoined the Mayor and Selectmen of MComb City from interfering in any way or by any means with complianne by the Greyhound Corporation with the laws of the United States and the regulations of the Interstate Commerce Commision prohibiting racial discrimination in the facilities of Interstate Commerce. (T.R. pp23,27, 36).

On Tuesday, November 28th, "White Only" signs were removed from the bus terminal (T.R. p. 93)

On the same day the Chief of Police for the city of McComb City learned from an agent of the Federal Bureau of Investigation that negro members of CORE would visit the city on the following day. (T.R. Pp. 204-5). The next morning, November 29th, a group of five negroes arrived by bus at the depot in McComb city. (T.R. Pp. 71-72) The purpose of the visit was to use the terminal facilities (T.R. 185) A large crowd had already gathered (T.R. pp. 71,73,77,136).

The negroes found that the bus terminal had been closed because of a gas leak (T.R. p73) The group left but later returned slightly after 3 P.M. on the same day(T.R. p.207) The group entered the terminal and proceeding to the white lunch counter, sat and requested service, from a Mr. Aubrey McGehee,

Co-appellee and lessee of the restaurant facilities (T.R. 140)

There was testimony that one negro beat the counter and asked plainly"Why in the Hell can't we get service." (T.R. p. 141) No white restaurant in McComb city had ever served negroes before (T.R. p 148)

McGehee, the owner refused to serve the negroes. As he turned south to sell a ticket, in McGehee's words " All Hell broke out" (T.R. p.115) The negroes were assaulted and ejected from the terminal(T.R. p. 85) On the following day, Thursday, November 30th, four citizens of McComb were arrested for assault and Battery, committed the day prior. (T.R. p.86,101).

On this day, the same day, after receiving a telegram from the Justice Department (T.R. p.218) requesting police protection at the terminal, the Selectmen of the city authorized the Police to patrol the terminal on a regular basis (T.R. pp 103-4, 209)

On Friday a field representative of CORE met the one-thirty bus from New Orleans (T.R. 175) and picked up a group of five negroe passengers (T.R. 178) without incident (T.R. 17809) The negroes returned to New Orleans on the 3:30 bus (T.R. p. 185)

On Saturday, December second, the field representative of CORE met negro passengers, all natives of McComb City (T.R. P. 182) who had arrived from Jackson Mississippi: The negroes left the bus and used the terminal with out incident (T.R. p. 187) but as they entered the auto of the CORE representative three people from a crowd that had gathered beat the auto with their fists and one used brass knuckles (T.R. p. 188)

A police officer asked them to discontinue and the beating atopped (T.R. p. 188) . On December second a complaint by the city of McComb and Mr. and Mrs. Aubrey McGehee was filed against CORE and John and Mary Doe as defendants (T.R. p.2) . A temporary restraining order was signed by District Court Judge Mize (T.R. p. 16) and after a hearing before Judge Harold Cox, a preliminary injunction was issued on December 22nd 1961 (T.R. p.242) enjoining defendant CORE and its officers, agents, servants, employees and attorneys, from "sponsoring, encouraging or financing persons to use the terminal facilities located in the city of McComb City . . . . for the purpose of fomenting violence or provoking breaches of the peace in or near said terminal facilities." (T.R. p/ 245)

STATEMENT OF THE CASE

Appellant appeals from the injunction granted by Judge Cox, sitting in the Southern District of Mississippi, Jackson Division (T.R. p246)

At issue in this case is both the propriety and constitutionality of a federal Court's use of its injunctive powers to enjoin CORE and its members from freely associating one with another ~~in so called Freedom Rides~~ to remove racial discrimination in interstate bus terminal facilities. (determine whether exisited or not) On the record in the District Court hearing, appellants question the propriety of an injunction where the weight of evidence failed utterly to demonstrate that CORE's activities were either designed to foment violence or breaches of the peace or that appellants conduct was the legal cause of what violence that did occur. For this reason appellants take exception to the broad and factually unsupported findings of fact in the District Court

p

proceeding. Appellants question the constitutionality of using injunctive process to restrain conduct which, except for the violence of third parties, would otherwise be permissible, if not laudatory. At the very heart of the constitutional issue is the question whether free speech and peaceful assembly may be suppressed upon a showing of sporadic violence or disorder by other than the free speech participants themselves. Appellants urge that a Court may not, from the fact of violence or disorder alone constitutionally conclude that otherwise peaceful conduct was designed for the purpose of fomenting the disorders. Appellants therefor urge that the injunction issued in District Court, lacked support in the record, violates Appellant's rights to freedom of speech, association and assembly, protected by the First Amendment, violates CORE's members privileges and Immunities as United States citizens, constitutes an Unconstitutional prior-restraint, fails to meet constitutional standards of specificity, and finally that the injunction while outstanding, unwarrantly damages the name and good reputation of CORE and its members.

I. Exceptions to the findings in the District Court

The trial judge found that CORE sponsored, financed and encouraged John Doe and others to come into the city of McComb City in order to foment violence and provoke breaches of the peace (T.R. p. 239) In the words of the District Court Judge

> " They came to McComb for the avowed purpose announced in advance, of testing the tempers of the community which upon their arrival they deliberately

set about to provoke; and to incite disturbances and violence upon themselves as a part of their desired and intended goal."

(T.R. p. 239)

The record shows clearly that defendants themselves at all times were peaceful. (T.R. pp. 74,102,200,211,212). The evidence was clear that police could have maintained order (T.R. pp.130, 201, 202); and that the principal violence which occurred on Wednesday in the restaurant facilities of the bus terminal was directly and proximately caused not by (any) misconduct but by a lawful request for service (T.R. p.142). Moreover there was evidence that if police had been stationed in the terminal on Wednesday, violence could have been averted (T.R. p. 142) Judge Cox finding that CORE's "announced purpose" was to foment violence alludes to absolutely no evidence to that effect. Quite the opposite, was testified to (T.R. p. 158-213).

There was no proof of a conspiracy between CORE and the wire services who publicized Wednesday's trip (T.R. pp. 66-7) The CORE REpresentative testified that publicity about riders does not further the aims and objects of CORE (T.R. p. 164) The evidence adduced the fact that Mr. Gorden, a selectman and Chairman of McComb City Police Committee himself wrote an inflamatory article in the McComb Enterprise Journal (T.R. p. 99) on the very next day after Wednesday's clashes (T.R. p. 105, 108)

If there was any design or purpose to provoke violence it was on the part of the Appellee, the city of McComb which instructed its Policeman on Tuesday not to patrol the station

(T.R. 63,126) and which permitted groups of persons to gather on Wednesday in the vicinity of the bus station prior to the arrival of the negroes (T.R. p71,73,77,136) even though they knew negroes were coming,(T.R. p. 58) and the crowd was predisposed to violence (T.R. p. 142)

In fact it required a telegram from the U.S. Attorney requesting and pointing out McComb City's obligations to provide protection (Defendant's exhibil numberl, p.218,) before the Selectmen reversed their earlier policy decision (T.R. 63,126) and authorized the police to patrol the terminal (T.R. 103-4, 209)

The judge found that "these missions of the defendant are not designed or intended in the public interest but are done for the sole puppose of disturbing the domestic tranquility of the community for its own financial gain". (p 239) There was no proof whatever that CORE stood to gain financially by encouraging the so-called freedom rides. That the missions are "not designed or intended in the public interest" is a matter o f opinion and not an established fact. If there were no "freedom rides" the Supreme Court Decisions and the I.C.C. regulations requiring restaurants in interstate bus terminals to serve on a non-segregated basis would be idle whispers. How else except by testing would it ever become known whether the regulations were being complied with.

In his findings as contained in the pre-amble to the pre-

preliminary injunction the District Court Judge stated that the members of the defendant "misled the police officials as to the timing of their plans on Wednesday so that they could arrive at said facilities while such local groups were present but in the tricked abxcence of such police officials who were in good faith, attempting to keep the peace" (T.R. p. 243)

This finding aludes to a call by an F.B.I. agent who stated that the negroes would arrive on Wednesday at the terminal at 3:25 when in fact they arrived there slightly after 3:00. (T.R. p. 207) . This discrepancy of some twenty minutes or so is the sole evidence upon which the sweeping findings were made. There was no proof whatever of an understanding or an relationship between CORE AND THE F.B.I. informant. The police were not misled because they had already determined not to have a patrol a t the bus station (T.R. 63, 126) If the police had been there, violence could have been averted (T.R. 210) It was not until the Department of Justice advised the Mayor that compliance with the three Judge Court order required the city to protect persons using the terminals that police were finally stationed in the terminal (T.R. 127)

The F.B.I agent was not called as a witness on behalf of Appellee

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. .....

C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and As Representative of Her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi,
Petitioners,

vs.

THE CONGRESS OF RACIAL EQUALITY,
Respondent.

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

INTRODUCTORY STATEMENT

This reply is necessitated by the gross inaccuracy of some of Respondent's statements, but more especially by the necessity for a correct consideration of Respondent's claimed standing in this case. If Respondent's contentions be allowed to stand it can safely be predicted the litigation load on Federal Courts will increase tremendously. The

few short minutes necessary to consider this reply, and if necessary to reconsider action taken on this petition, may be worth untold hours to future judicial administration.

THE CORPORATION CORE HAS NO STANDING TO BRING THIS SUIT

(A) CORE Has No Standing to Assert the Constitutional Rights of Other Persons Not Parties to This Litigation.

This is not a class action. It is a suit in which a corporation asks:

> "May Congress of Racial Equality (a New York corporation) assert the rights of freedom of speech and assembly?" (Reply page 4)

If this Court has not answered that question point blank by stating:

> "As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the *liberty* guaranteed by the due process clause is the liberty of natural, not artificial, persons." *Hague* v. *C.I.O.*, 307 U.S. 496, 527. (Emphasis supplied)

then the English language is incapable of definite expression.

The identical privileges and immunities here claimed were there involved—freedom of speech and assembly. The decision is authoritative precedent which the Court of Appeals has not properly heeded. Respondent's attempted aspersion to the effect that this point was only made in concurring opinions does not detract from the vitality of this authority. The assertion of that right was

one of the points in issue and the rights of the corporate party were finally denied by this court on that precise premise!

In a footnote to its majority opinion in this case, the Fifth Circuit stated:

> "Congress of Racial Equality may assert the constitutional rights of its members. See *NAACP* v. *Alabama,* 357 U.S. 449."

This authority (the only one cited on this point) is entirely inappropriate to permit CORE to litigate this case.

> In *NAACP* v. *Alabama,* 357 U.S. 449, this Court stated: "To limit the breadth of issues which must be dealt with in particular litigation, this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves. Tileston v. Ullman, 318 U.S. 44, 63 S. Ct. 493, 87 L. Ed. 603; Robertson and Kirkham, Jurisdiction of the Supreme Court (1951 ed.), § 298. This rule is related to the broader doctrine that constitutional adjudication should where possible be avoided. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-348, 56 S. Ct. 466, 482-483, 80 L. Ed. 688 (concurring opinion). *The principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court.*
>
> "If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. *To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion.*" (Emphasis supplied).

Bates v. *City of Little Rock*, 361 U.S. 516, and *Louisiana* v. *NAACP*, 366 U.S. 293, are almost identical in legal import and fact content to the *Alabama* case.

Respondent also cites *NAACP* v. *Button*, 371 U.S. 415. The statement in that case to the effect that a corporation may assert the privileges and immunities of individual citizens *must* be considered in the light of the citations supporting that statement. All of the cases there cited deal with situations where *only* the corporation was capable of effectively asserting the privilege involved. If the individual persons in those cited cases had attempted to assert the privilege claimed, that very act would have defeated it. *It is not so here.*

McCabe v. *A., T. & S. F. Ry. Co.*, 235 U.S. 151, is another authority which illuminates the need for certiorari. It negated the right of a litigant to sue on behalf of other non-parties where the persons suing had suffered no deprivation of the rights asserted. The reasoning is certainly sound. If such were not the rule, the amount of litigation would mount astronomically. For this and the very salutary reasons discussed in *NAACP* v. *Alabama*, *supra*, this rule should not be abrogated here where no showing whatever is made that Respondent Corporation must protect the asserted right or see it fail. Any natural person who claimed any personal constitutional immunity or privilege had been abridged by the Court's order here could certainly have appealed.

(B) CORE Has No Standing to Assert the Right of Free Speech and Assembly in Its Own Behalf.

In an attempt to support its standing to prosecute the appeal in its own right, the Respondent Corporation has placed its principal reliance upon *Grosjean* v. *American*

Press Co., 297 U.S. 233, which held a unique state tax, unlike anything ever imposed on newspapers in the previous history of all of the United States, amounted to a calculated device in the guise of a tax to limit the circulation of certain newspapers. The Court held that the corporation had a *proprietary* standing to assert that the confiscation of their *property* violated their right to equal protection and due process of law. Freedom of the press is included in the express terms of the First Amendment and is thus brought under the ambit of 14th Amendment protection from state encroachment. The vital distinction is that there the Corporate Respondent's *own property rights* were there in jeopardy not liberty or privileges or immunities. The Court was careful in *Grosjean* to recognize that:

> "A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause (of the 14th Amendment)."

Contrary to the position of the publishing companies in the *Grosjean* case, the corporation, which is Respondent here, can only contend that it is entitled to assert privileges and immunities which it does not have and is incapable of having or enjoying.

Since *Paul* v. *Virginia*, 8 Wall. 168, 19 L. Ed. 357, this Court has consistently held that the fictitious legal entity called a corporation is not a "citizen" within the meaning of the privileges and immunities clause of the 14th Amendment to the Constitution. It cannot assemble. It cannot speak. The fact that it is a "person" capable of owning and dealing with *property* and possessed of rights to equal protection of its *property* and due process of law as respects its *rights of property* within the framework of the same amendment, does not modify or detract from these holdings in the slightest.

Respondent also cites *NAACP* v. *Button* in support of its claim to standing to assert a "right" of its own to free speech and assembly. We respectfully submit the Court should most carefully consider the authority cited in the *Button* Case to support the statement that NAACP had a direct standing to test the constitutionality of a statute which curtailed a primary business purpose of that corportion, to wit: urging individual citizens to pursue legal recourse as parties, *for the protection of the rights of such individuals.*

If the Court does not limit this holding to the import of the *Grosjean* case, upon which *Button* relied, it will, in our opinion, open a veritable Pandora's Box. It is difficult to imagine how many lawsuits a corporation might bring if *it* could sue every time it thought *someone else* might need to go to court.

Assuming *arguendo* that the record showed the purpose of CORE's incorporation, which it does not, and so assuming further that one of the reasons Respondent was incorporated was for the purpose of instituting law suits to vindicate the constitutional rights of individual citizens, it would be a complete non-sequitur to hold that by its own act of incorporation it could thus *create a right in itself* which would enable it to circumvent this Court's long standing and salutary policy of permitting litigation only by those whose rights are directly affected, except only where a representative is the sole efficient means of preserving the rights of such non-parties.

It at once becomes apparent that a contrary holding would create a vast amount of litigation *on both sides* of civil rights issues and *on both sides of* numerous other areas of litigation in today's high-pressure, group action world. If a pressure group can create a right to litigate

for others by the simple expediency of incorporating to do so, it is difficult to imagine how many cases the corporation would litigate that would never otherwise be filed; the very volume of which would be damaging to sound judicial administration (and no doubt would frequently damage the rights of those who are involuntarily or unknowingly brought before the court).

REPLY TO RESPONDENT'S STATEMENTS

Respondent states:

> "This petition for certiorari is *one more dilatory tactic* by the City of McComb, Mississippi, in a campaign to delay giving Congress of Racial Equality and its members the right freely to use interstate bus facilities at McComb." (Emphasis supplied) (page 5).

This statement is false. The record before this Court clearly demonstrates that petitioners did not even *apply* to this Court or to the Court below for a stay pending a ruling on this petition. The mandate of the Court of Appeals has been filed in the District Court since June 10, 1963, and that Court's injunction has long ago ended.

The statement was always false. The District Court's Preliminary Injunction expressly excluded ". . . any impingement upon the normal, usual or ordinary travel of any person in interstate or intrastate commerce to, through or from the City of McComb, Mississippi." The only conduct ever enjoined was that which was designed to foment violence and provoke breaches of the peace. This is an obvious attempt to divert the court's attention from the fact that this is *not* a segregation controversy, but a very basic peace-keeping issue which is not unique to McComb or its bus terminal. (Cf. this court's own regulations, 40 U.S.C., § 13j.)

Respondent states:

> "The injunction was more than a simple interference with speech, it was a prior restraint of speech, as evidenced by *the simple fact that members of CORE have not been in the McComb bus station since 1961.*" (Emphasis supplied) (page 5)

and also alleges that it is:

> ". . . directly engaged in activities of speech and assembly." (page 9)

Respondent must now realize the absence of record support in this case for the decision of the Court of Appeals and thus chooses to interject matters wholly outside the proof made. If this "simple fact" had the least relevancy it was easily capable of proof, which the Respondent did not choose to make. The record is likewise completely silent as to the purpose of the Respondent's corporate existence or its activities. (See footnote 1, Judge Gewin's dissent, Appendix to Petition, A. 26.)

In a footnote the Corporate Respondent states:

> "This action was originally brought against 'Congress of Racial Equality, John Doe and Mary Doe.' It is plain, then, that petitioners originally intended this action to run against individuals, members of CORE, as well as against the organization. This state of the facts cannot be changed now by *drawing the petition herein against CORE alone.*" (Emphasis supplied) (page 9)

The short answer to this position is that *only the corporation, CORE,* was enjoined. *Only the corporation* appealed. *Only the corporation* is respondent here.

CONCLUSION

This is no mere technicality. We respectfully submit that, in conflict with the decisions of this court, the Fifth Circuit has now so extended an exception to a salutary rule limiting litigation that it has, in practical effect, abolished the rule itself. If this is not corrected it will inevitably have a tremendous impact on already burdened court calendars. It is bound to provoke numerous constitutional controversies contrary to the announced determination of this Court to avoid such adjudications where possible. Certiorari should be granted.

Respectfully submitted,

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SUPREME COU

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C. H. DOUGLAS; M
and As Representati
McGehee; and R. C
City of

THE CONGR

PETITION FOR
UNITED ST
FOR

JOE T. PATTERSON,
Attorney General
State of Mississip
Jackson, Mississip
Of Counsel.

E. L. MENDENHALL, INC.,

IN THE

URT OF THE UNITED STATES

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No. .....

MRS. AUBREY McGEHEE, Individually
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Petitioners,

vs.

RESS OF RACIAL EQUALITY,
Respondent.

R WRIT OF CERTIORARI TO THE TATES COURT OF APPEALS R THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. .....

C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and As Representative of Her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi,

Petitioners,

vs.

THE CONGRESS OF RACIAL EQUALITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. H. Douglas and Mrs. Aubrey McGehee, appearing in her own proper person and as representative and next of kin of her husband, Aubrey McGehee, deceased, two of the Appellees in the Court of Appeals below, and R. Gordon Burt, Jr., the newly elected and qualified Mayor of McComb City, Mississippi, pray that a Writ of Certiorari issue from this Honorable Court to review the judgment and order of the United States Court of Appeals for the Fifth Circuit hereinafter set out in Section B of this petition.

A.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in ..... F.2d ..... A copy of said opinion is appended.[1]

B.

JURISDICTIONAL GROUNDS

(i) The judgment sought to be reviewed was dated the 15th day of May, 1963 and was entered on the same date. The judgment was issued as the mandate of the Court of Appeals to the District Court on the 10th day of June, 1963. A copy of said judgment is appended.[2]

(ii) No petition for rehearing was filed and no order respecting a rehearing was entered. No order granting any extension of time within which to petition for certiorari was sought or entered.

(iii) This court has jurisdiction to review the judgment in question by writ of certiorari under the provisions of 28USC § 1254(1) and § 2101(c).[3]

C.

QUESTIONS PRESENTED

1. Are the guarantees of First Amendment to the Constitution so absolute as to require a Federal Chancellor to await an actual physical breakdown of local police and peacekeeping authority before exercising his discretionary

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1. See Appendix, Page A8.
2. See Appendix, Page A6.
3. See Appendix, Pages A1-A3.

authority to partially restrict further or continued demonstrations against local customs and practices?

2. Does the judgment of the Court of Appeals for the Fifth Circuit abridge Rule 52(a)[4] of the Federal Rules of Civil Procedure and in conflict with this court's decisions in *U. S.* v. *National Association of Real Estate Boards,* 339 U.S. 485, 70 S. Ct. 711, 94 L. Ed. 1007 (1950); *U. S.* v. *E. I. DuPont de Nemours & Co.,* 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1273 (1955); *International Boxing Club* v. *U. S.,* 358 U.S. 242, 79 S. Ct. 245, 3 L. Ed. 2d 279 (1959)?

3. Is the judgment of the Court of Appeals contrary to this court's decision in *Hague* v. *C.I.O.,* 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1938)?

D.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Because of the length of the provisions involved, their citation alone is set out at this point and their pertinent text is set forth in the appendix.[5]

The Constitution of the United States:

Amendment I.
Amendment IX.
Amendment XIV.

United States Code:

Title 28, § 1254(1), Certiorari Jurisdiction.
§ 2101(c), Review on Certiorari.
§ 1332, District Court Jurisdiction.

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4. See Appendix, Page A5.

5. See Appendix, Pages A1-A5.

§ 1343(4), District Court Jurisdiction.
§ 1291, Court of Appeals Jurisdiction.
§ 2072, Rule Making Authority.
Title 42, § 1985(2) and (3), Conspiracy to Interfere with Civil Rights.

Federal Rules of Civil Procedure:

Rule 52 (a).

E.

STATEMENT OF THE CASE

1.

Jurisdiction

Jurisdiction was vested in the court of first instance under Title 28, *U.S.C.*, § 1332.

There was a diversity of citizenship between petitioners, who are citizens of the State of Mississippi, and THE CONGRESS OF RACIAL EQUALITY, which is a corporation incorporated under the laws of the State of New York. All of the proof by way of verified pleadings, affidavit and oral proof indicates that the John Doe defendants who were never served with process were citizens of states other than Mississippi.

The Complaint alleged wilful, intentional, deliberate action on the part of the defendants. These allegations would certainly support a claim by petitioners for punitive as well as actual damages under their prayer for general relief. In this status of the pleadings, a good faith claim was presented which met the jurisdictional amount requirement. *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938).

The court of first instance also had jurisdiction of this cause under Title 28, *U.S.C.*, §1343. Title 42, *U.S.C.*, §1985(2) and (3), is violated whenever two or more persons conspire for the purpose of depriving any person directly or indirectly of the equal protection of the law or of equal privileges and immunities under law, and whenever they so conspire to prevent or hinder the duly constituted authorities of a State from giving or securing such equal protection of the laws to all persons under their jurisdiction. The respondent corporation was charged with formulating and carrying on a plan to foment violence and breaches of the peace in McComb to attract attention to itself. The proof is abundant and uncontradicted that their activities did actually hinder the rule of law in McComb to the detriment of petitioners.

District courts have original jurisdiction of any action authorized under §1985 of Title 42, *U.S.C.*, to recover damages or to secure equitable or other relief. Title 28, *U.S.C.*, §1343(4).

The utilization of a Writ of Injunction to protect rights encompassed within Title 42, §1985 (2) and (3) has been approved. *Brewer* v. *Hoxie School District,* (C.A. 8th, 1956) 238 F.2d 91.

2.

Pleadings and Proceedings

Petitioners filed a sworn complaint on the 2nd day of December, 1961 (T. 2), alleging that the Respondent, The Congress of Racial Equality—CORE, *a corporation incorporated under the laws of the State of New York,* was sponsoring, financing and encouraging persons to come to McComb City, after publishing their intention so to do, in order to foment violence and provoke breaches of the peace

in and around the bus and rail terminal facilities in McComb City.

On the same date Petitioners moved the Court for the issuance of a Temporary Restraining Order Without Notice (T. 8). This motion was supported by the affidavit of William A. Wiltshire (T. 11). The affiant, who was the City Attorney and a resident citizen of the municipality, averred that persons named therein who had been identified in the press, radio and television media as members of CORE, had come to the Greyhound Bus Terminal and, after giving false information as to their plans, appeared at the bus station in the presence of a belligerent crowd approximately one-half hour earlier than the police were advised they would. He further averred that while these persons were in the terminal they unnecessarily, rudely and violently beat upon the counter of the restaurant in the terminal and spoke and shouted in loud and boisterous language and that their actions provoked a breach of the peace therein. Affiant stated that these actions were done with the knowledge and intent of creating disturbances and provoking violence and breaches of the peace in the absence of police officials (T. 12).

A temporary restraining order enjoining the Respondent Corporation, CORE, from continuing to sponsor, finance or encourage persons to utilize the terminal facilities for the purpose of fomenting violence and provoking breaches of the peace in or near said facilities, was issued at 4:00 o'clock p.m. on the same date by District Judge Sidney C. Mize (T. 15).

On the same date Petitioners filed a Motion for Preliminary Injunction noticing the same for hearing on Thursday, December 7, 1961 (T. 7), at which time it came on to be heard.

At the commencement of the hearing on the Motion for Preliminary Injunction on December 7, 1961, Respondent filed (1) a Motion to Stay because of the pendency of the three-judge Federal Court action in *United States* v. *Mayor and Selectmen of McComb City,* Civil Action No. 3215 in said District Court (T. 21); and (2) an application for the convening of a statutory three-judge court pursuant to §§ 2284 and 2325 of Title 28, *U.S.C.* (T. 23).

During the course of the hearing on the preliminary injunction, Petitioners called five witnesses on direct examination and called Thomas Gaither, a salaried field representative of the Respondent Corporation, for cross-examination as an adverse witness. The affidavit of William A. Wiltshire was also introduced in evidence under a ruling reserving to the Respondent the right to call Wiltshire, who was present in the courtroom, for cross-examination (T. 54). At the conclusion of Petitioner's proof, CORE offered no proof but filed two additional unsworn motions and rested (T. 215). One was a Motion to Dismiss the proceedings for failure to state a claim upon which relief could be granted (T. 17); the other was styled, "Motion to Dissolve Temporary Restraining Order and Statement in Opposition to Motion for Preliminary Injunction" (T. 25). Both these motions attacked the court's jurisdiction and alleged the injunction prayed for would abridge constitutional liberties and be a burden on interstate commerce.

Only routine appellate procedures of briefs and oral argument occurred in the Court of Appeals. That Court's judgment and mandate is appended.[6]

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6. See Appendix, Page A6.

3.

Statement of Facts

McComb City, Mississippi, has a population of approximately 14,500. In November, 1961, it employed a total of fifteen active police officials on all shifts (T. 59). On the 28th day of November a Preliminary Injunction was served on the City in Civil Action No. 3215, *United States* v. *Mayor and Selectmen of McComb City* (T. 59). On the same date, Jerome Smith, the "Chairman of the New Orleans CORE" telephoned Thomas Gaither, the field representative of the corporation in Jackson, Mississippi, to inform him that a New Orleans CORE group would travel to McComb by bus (T. 159). On Tuesday evening, November 28, 1961, Jack Quigley, an Agent of the Federal Bureau of Investigation, called George Guy, the Chief of Police of McComb, Mississippi [a police officer of 25 years' experience (T. 209)], and told him that CORE was planning to send a group of people to the McComb bus terminal from New Orleans (T. 204, 5). The group of which Jerome Smith was a member arrived in accordance with Mr. Quigley's information (T. 205). Three hours before the arrival of Jerome Smith and his group, radio, television and newspapers had announced their anticipated arrival (T. 68) and during the early part of that morning a number of newsmen had come into McComb from as far away as Atlanta, Georgia (T. 69, 70). Prior to the time of the Smith group's arrival a gas leak developed in the cafe in the bus station and it had been cleared of people (T. 73), but there were groups of people standing at some distance East and West of the Bus station (T. 73). When Smith and the others with him debarked from the bus they found the station closed and departed without incident (T. 74). Officials of the McComb Police Department were present

and had the crowd under control that morning (R. 76). The crowd was composed of members of both the white and negro races (T. 77). At about 2:00 p.m. on Wednesday, November 29, a disturbance occurred at the bus station involving a photographer (T. 75). During the progress of the investigation of that event, Federal Agent Quigley again contacted Chief Guy (T. 206) and advised him that he had been in touch with the Jerome Smith group and that they would go to the bus station at 3:20 or 3:25 p.m. and catch the 3:30 p.m. bus out of McComb (T. 207). When Agent Quigley talked with Chief Guy, the Chief advised him that he planned to have his police force present at the bus station at the time the Smith group planned to return (T. 210, 214, 5). Shortly before 3:00 p.m., Agent Quigley returned to the City Hall and advised Chief Guy that there had been a fight at the bus station and Chief Guy went there immediately. He found that the Smith group had come back about a half hour prior to their announced schedule (T. 207).

Immediately prior to the arrival of this group, Mr. McGehee, the operator of the restaurant in the Greyhound Terminal, was sitting outside of the restaurant talking to a man who identified himself to McGehee as a Television Cameraman from Station WDSU (T. 137). During the conversation, the Cameraman jumped up and ran to the corner where some negroes (the Smith group) were getting out of a car. He walked with them to the terminal. As the group started to go in the East door, which was formerly designated the colored waiting room, the cameraman motioned them to the other door on the West side, which was formerly the white waiting room, and told the Smith group to go into that door (T. 138).[7] McGehee

7. All signs indicating any racially segregated use of the terminal had been removed previously in accordance with the Court's injunction in Cause No. 3215.

followed the group into the terminal building when they entered. They took seats at a counter and began to beat and knock on the counter and loudly demand service. One female in the group said loudly and fractiously (T. 144), *"Why in the hell can't we get service in here?"* The police were not present but another group of people were inside the terminal. McGehee thought violence would ensue (T. 142). He requested the Smith group to cease their agitation and to go to the other side of the terminal, that formerly had been designated as the "colored" waiting room (T. 141). At this point other persons in the terminal physically attacked the Smith group (T. 142).

When the police arrived, with the help of a loud speaker system, they brought the racially mixed crowd at the bus station under control. The crowd obeyed the orders of the police reluctantly, but without further fisticuffs or scuffling (T. 77). The Chief of Police and the Police Commissioner of the City attempted to locate the Smith group in order to secure aid in identification of the persons involved in the disturbance but the Smith group could not be found at that time (T. 85). Later that day, at about 6:00 o'clock p.m., they were contacted by the police but refused to prefer charges. The police continued to investigate the disturbance and subsequently arrested four men in connection therewith at about noon the next day (T. 86).

For months prior to this incident members of the negro race had used the part of the terminal facilities designated for the use of whites without violence (T. 143, 4). There had been racial disturbances between members of the white and colored races with regard to public schools in McComb prior to the time of this CORE-sponsored bus station incident, but CORE had received no publicity in connection with those situations (T. 169). On Wednesday

afternoon or Thursday morning (T. 126), Mayor Douglas talked with Assistant United States Attorney General Burke Marshall (T. 128) and told him that the City had decided it might be a violation of the injunction issued against them to place an officer inside of the station. Marshall nevertheless encouraged him to take this action (T. 129). In the course of their conversation, the Mayor said to Marshall, "If we can have these *publicized* movements discouraged and discontinued, it will be a lot of help to us in maintaining and keeping peace and order." "If Washington will use their influence, or what influence they have, to discourage that, it will be helpful." In reply to which Assistant Attorney General Marshall stated, "I'll do that today and call you back." In a return call Assistant Attorney General Marshall advised that he had had a telephone conversation with CORE's headquarters and that they had promised to discontinue these *publicized* movements (T. 131, 2). Evidently Marshall had also contacted CORE's Jackson field representative because that representative, Thomas Gaither, had given Jerome Smith of New Orleans the telephone number of Marshall in Washington, D. C. (T. 172). On Thursday, November 30, Assistant Attorney General Marshall anomalously wired the Mayor that his interpretation of the Court Injunction did not prohibit the McComb Police from patrolling the bus station premises, *provided their presence did not "have the purpose or effect of coercing racial segregation."* (Defendant's Exhibit #1) (T. 218). The City then decided to take the risk of placing uniformed policemen inside the terminal (T. 129). Correct compliance with the injunctive order was a matter of serious concern to the governing officials of McComb (T. 104, 123).

During the day on Thursday, the Associated Press Wire Service carried stories to McComb that the Smith

group, upon their return to New Orleans, engaged in meetings there and several of them were quoted in press interviews as stating that they planned to return to McComb on Friday from New Orleans on the 10:19 a.m. bus and from Baton Rouge on the 1:30 p.m. bus (T. 79). At approximately 11:00 a.m. Thursday morning, Gordon Carey, the National Field Director for CORE in New York called Gaither, the corporation's Field Director in Jackson, and instructed him to go to the Greyhound Station in McComb on Friday to meet expected bus passengers (T. 172, 3). Upon his arrival in McComb, Gaither called Doris Castle, a member of "our New Orleans CORE Group" to get the details of the time of arrival of the passengers he was supposed to meet (T. 175).

On Friday, Gaither went to meet the 1:30 p.m. bus and at his request the Assistant Chief of Police of the McComb Police Force reserved a place convenient to the station for Gaither to park. Chief Guy offered him an escort. Although Gaither testified that he had some fears or apprehensions for his safety, he stated that they were not due to anything on the part of the police—that his fear came from the presence of the crowds near the station (T. 179). When the group arrived they "used the facilities at the McComb bus station," then went to a restaurant to get something to eat, got back on the bus and left without incident (T. 185, 186).

On Saturday, Gaither again went to the bus terminal to pick up bus passengers. The evidence is conflicting as to whether any disturbance occurred in the terminal building (T. 190, 195-197). The evidence is also conflicting as to the extent of a disturbance at Gaither's car. He states there were several blows struck against the car for a matter of a minute until a police officer heard the disturbance and came to the car and stopped it (T. 190).

Officer Smith stated that only one blow was struck against the car and that he immediately went to the scene and told the person to move on. *The evidence shows without dispute that the city officials and police gave the best possible protection to the agitators during the entire period of the demonstrations. Neither the police nor any city official ever enforced or attempted to enforce racial segregation at or near the terminals and no race based orders were ever directed to those in or near the areas of disturbance, rather, the only function of these officials was to attempt to keep the militant crowds under control and to keep peace and order.* Except when they were misled as to arrival time, the police allowed the demonstrators the free use of the terminal facilities and kept the crowds away from them (T. 76-78, 89-90, 94, 129-130, 214-215).

The McComb Police Force had never had any difficulty in keeping peace and good order in McComb in the past (T. 213). During the period from Tuesday, the 28th day of November, 1961, until the issuance of the Temporary Restraining Order, in the words of the witness, Gordon, a newsman, and the City's Police Commissioner: "The people of the City were obviously greatly disturbed. They were reluctant to go about their ordinary business. The situation was extremely tense, explosive." (T. 92). Business in general in the community was seriously affected (T. 122) and Mr. and Mrs. McGehee were forced to abandon and close their private restaurant business (T. 146).

By Friday of the week of the demonstrations it was found necessary to increase the size of the police force (T. 213); by then every local policeman was on duty except one (T. 213). Off-duty policemen were used for extra duty on a double time basis until the Temporary Restraining Order took effect (T. 132, 3). Sheriffs, Deputy Sheriffs and State Highway Patrolmen had joined in as-

sisting the local police, which was a very unusual situation (T. 96). In the Police Commissioner's opinion, continued *publicized* demonstrations and agitation would have resulted in "chaos" and an "intolerable burden" would be placed on the local police force (T. 97).

The continuous burden placed on the City's small police force by these widely publicized agitations and demonstrations had existed for four days and nights before tensions were lifted by the District Court's Temporary Restraining Order required a temporary respite in *publicized* demonstrations and agitation. When the Temporary Restraining Order was issued the tense and explosive atmosphere in the community which had required 24-hour police surveillance, was tremendously improved (T. 95, 122), *although members of the negro race continued to use the terminal facilities* (T. 95)

F

ARGUMENT

Preliminary Statement

The fact subject matter of this petition includes the area of race relationships in Mississippi. One would be naive in the extreme to suppose that this issue does not provoke intense, albeit sometimes varying, reactions from the jurist as well as the ordinary man in the street. Petitioners feel it is imperative at the outset to state that the questions presented by this petition are *not* questions of segregation or unconstitutional racial discrimination or distinctions. The basic issues are (1) When does the government's peace-keeping responsibility permit the partial, temporary suspension of continuous demonstrations which have provoked burdens that threaten to exhaust its peace-keeping ability?; and (2) Does this court intend

to overrule its decision in *Hague* v. *C.I.O., supra,* and create a new hybrid type of reverse derivative right in corporations to assert first amendment protections of individuals?

The fact that these issues arose against a background of racial unrest does not alter the basic legal issues.

1.

No Unconstitutional Abridgement of First Amendment Rights Resulted from the Issuance of the Preliminary Injunction

Although Petitioners respectfully submit that an examination of the record in this case discloses that the findings of fact by the District Judge were amply supported by the evidence and the logical and reasonable inferences to be deduced therefrom, no resolution of fact which is in dispute between the District and the reviewing court affects the legal error committed by the appellate court. (For convenience, the District Judge's order is appended hereto.[8]) Two judges of the Court of Appeals, after review of the cold record, held that this Federal Chancellor, who not only heard and observed the witnesses but was closest to the background and circumstances against which these agitations were cast, and who best knew, of any member of the Federal Judiciary, the realities of the racial situation in this community; had abused his discretion in granting a *very limited* preliminary injunction. He temporarily enjoined a corporation from continuing its sponsorship of the *publicized* use of rail and bus terminals in a beleaguered small town *after four consecutive days* of demonstrations which were accompanied by breaches of the peace, tension and intense peace-keeping difficulty.

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8. See Appendix, Page A37.

The Circuit's majority opinion redetermined certain of the trial judge's preliminary findings of fact and came to the conclusion from "the whole record" that they would have acted differently if they had been invested with original and not appellate jurisdiction. The dissenting Court of Appeals' judge has completely documented the record facts upon which the district judge's opinion was based and, except to refer to this documentation it will not be further discussed, because the stated differences in fact resolution do not control the legal issues.

With deference, we submit that the majority judges incorrectly interpreted this court's decision in *Edwards* v. *South Carolina,* No. 86 (Feb. 25, 1963) ..... U.S. ....., 83 S. Ct. 680, ... L. Ed. ....., and took it to control the legal questions presented here.

With regard to the limited Preliminary Injunction, they stated:

> "We find that the injunction below is an unconstitutional abridgement of the First Amendment rights, as protected by the 14th Amendment, as a prior restraint on the freedom of speech . . .
>
> "The injunction, if allowed to stand, would amount to a *complete* deterrent to the members of CORE to peacefully demonstrate against the segregation policies of the City of McComb. (Emphasis added)
>
> "CORE and other organizations, organized for the purpose of peacefully demonstrating and speaking against unconstitutional state and local laws enforcing segregation would find themselves virtually inarticulate."

A word by word review of the entire record in this cause fails to furnish any basis for the last two statements. Nowhere is the purpose of the corporation, CORE's, organization even touched upon.

Agitators, who were encouraged by CORE to come into the City of McComb, came for the publicly announced purpose of using terminal facilities which had been in use on a racially integrated basis for many months prior to their arrival, and this integrated use continued uninterruptedly after the issuance of the injunction. The Preliminary Injunction Order specifically exempted travel for any lawful purpose and required the use of any facility at the terminal without regard to the race or color of the traveler. It simply temporarily lifted an intolerable burden which threatened the immediate breakdown of peace and order in an entire city from the shoulders of a small police force *after* long continued demonstrations had been protected to the best of the police force's ability. If there was ever a time when a point of clear and present danger had been reached, it was evidenced by the record in this case. But such a record is not necessary to constitute error on the part of the appellate review court. Actually, the purpose of a preliminary injunction is not to decide or prejudge the merits but to preserve the status quo until the rights of the parties may be fully determined by trial. *Miami Beach Fed. Savings & Loan Assn.* v. *Callender,* (5th Cir., 1958) 256 F.2d 410; *Weiner et al.* v. *National Tinsel Manufacturing Co.,* (7th Cir., 1941) 123 F.2d 96; cf. *Mayo* v. *Lakeland Highlands Canning Co.,* 309 U.S. 310, 60 S. Ct. 517, 84 L. Ed. 774 (1940). The proof is not required to be complete enough to demonstrate the right to a decree after trial in order to justify preliminary injunctive relief. *Duckworth* v. *James,* (4th Cir., 1959) 267 F.2d 224, cert. den. 361 U.S. 835; *Burlington Mills Corp.* v. *Roy Fabrics,* (D.C., S.D., N.Y., 1950) 91 F. Supp. 39, aff. (2nd Cir. 1950) 182 F.2d 1020.

Preliminary injunctive relief is available from a Court of Equity to maintain the status quo by restraining an act

contrary to equity and good conscience, especially when it is demonstrated that the applicant will be irreparably injured in the absence of such relief. *Beacon Theatres, Inc.*, v. *Westover,* 359 U.S. 500, 506-7, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959). Injunctive relief may be granted to prevent the improper or illegal use of public places. 43 *C.J.S.* 762-65, Injunctions, §§ 151-3 (cf. *U. S.* v. *Wood et al.*, (5th Cir., 1961) 295 F.2d 772, where a presumptively valid state criminal prosecution was enjoined by this same circuit because it would possibly have adverse effects on members of a community).

The public interest carries a great weight in the balance scale which the court is required to use in determining whether to grant or to withhold preliminary injunctive relief. 7 *Moore's Federal Practice* 1627, 8. Where grave questions are presented and injury to the complaining party would be certain and irreparable if the motion was denied and a final decree would be found not in favor, while the injunction, if it be granted, would not cause any considerable injury to the opposing parties, the injunction ought to be granted. *Meccano, Ltd.*, v. *Wanamaker,* 253 U.S. 136, 141, 40 S. Ct. 463, 64 L. Ed. 822 (1920); *City of Miami Beach* v. *Benhow Realty,* (5th Cir. 1948) 168 F.2d 378.

With deference, we submit that the majority judges in the Court of Appeals not only were factually incorrect in their assessment of the record but were legally incorrect in making a redetermination of the facts, in view of the above authorities. This was certainly not the same situation as was presented in the *Edwards* case, *supra.* In the *Edwards* case *the first* demonstration was *in progress* on the grounds of the capitol where the legislature was convened when the *police,* acting under a *statute,* moved in to halt the demonstration *entirely.* The only analogy to this

present matter was the fact the imminent threat to peace and order came from another group which resented the existence of the demonstration.[9]

After the lengthy period of continuous tension, which group threatened overt action was of as little consequence to the sleepless and exhausted police as it was to the legal issues involved.

We respectfully submit that the reviewing court's determination that the injunction constituted a "prior restraint" on free speech or assembly or demonstration or agitation is wholly unwarranted. Not only had this corporation not been restrained from assembling, speaking, demonstrating and agitating, *it had in fact been protected in the very acts of such speech, assembly, demonstration and agitation for four continuous days prior to the time that a Chancellor decreed that certain aspects of such demonstrations should be temporarily suspended.*

This case is unique in other respects. In all prior decisional law where a claim has been made that action amounted to unconstitutional restraint on freedom of speech or assembly, such complaints were bottomed upon the application of inflexible statutes or ordinances with the single exception of *Thomas* v. *Collins*, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945). In that case a restraining order was issued, without a hearing, *prior* to the time that the appellant spoke *and the restraining order was based upon the existence of a statutory requirement.* The court ex-

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9. Of course, the two groups had equal constitutional right to hold the personal views which caused the difference of opinion between them even though neither had any right to break the proper criminal proscriptions on orderly conduct. *Shelly* v. *Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A.L.R. 2d 441 (1948).

pressly confined its decision to the application of the statute.

This court has pointed out what common sense certainly dictates—that the fourteenth amendment's protection, even in first amendment areas, does not prevent the substitution of a Chancellor's Decree for a policeman's club. *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836 (1941). You have also declared that constitutional guarantees are not paramount to those reasonable exercises of the police power that are necessary to promote peace and good order. The court has often recalled the language of Chief Justice Hughes in *Cox* v. *New Hampshire,* 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396 (1941):

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

Claimed violations of First Amendment rights have so often been before this court that it would be presumptuous to burden the court with numerous citations. For ease of reference to some of these cases pertinent here, we would refer the court's attention to its majority and dissenting opinions in: *Edwards* v. *South Carolina, supra,* adding only the citation of *American Communications Assn.* v. *Douds,* 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950); *Schenck* v. *U. S.*, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919); and *Beauharnais* v. *People*, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919 (1952). Cf. *Dennis et al.* v. *U. S.*, 341 U.S 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951), wherein the court stated:

> "Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature.

"If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."

In *Beauharnais* v. *People, supra,* the court emphasized the necessity for a thorough consideration of the historical background against which events were set in considering whether or not a statutory limitation on speech and assembly would be permitted. McComb City, Mississippi, is a relatively small southern community which, during the entire lifetime of its present residents, had followed the custom and practice of racial segregation. Earlier in the year racial demonstrations involving schools in the community had taken place heightening a tense situation. One day prior to the first of Respondent's actions the police force and officials of the city were enjoined to refrain from any law enforcement activities which might be construed as "seeking to enforce or coerce the segregation of the white and negro races in their use of terminal facilities used in interstate commerce."[10]

News media had exploited the local situation to the fullest. At this time and under these circumstances we submit that by the long continued and highly publicized provocative demonstrations the corporate respondent had finally placed itself outside of the ambit of reasonable free speech. As will be demonstrated below, the corporation, CORE, *which was the only appellant in the reviewing court,* had no constitutionally guaranteed right of speech

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10. In this connection, the city had determined that placing uniformed policemen with badges and guns inside the terminal facilities would constitute action which would be a violation of that injunction. This determination was in full accord with existing decisions of the Court of Appeals for the Fifth Circuit. *Baldwin* v. *Morgan,* (5th Cir. 1961) 287 F.2d 750, 757, and *Meredith* v. *Fair,* (5th Cir. 1962) 305 F.2d 343, 359.

or assembly to petition. The trial judge was well within his area of discretion in determining to grant the very limited preliminary injunction.

2.

The Court of Appeals Erred in Substituting Their Judgment for the Judgment of the Trial Court Judge on This Record

A very limited issue presented itself for appellate determination. This was not an issue of the factual merits or demerits of the petitioners' claim for temporary injunctive relief. As demonstrated in argument under Point 1, the trial court was not reaching a decision on the merits of the controversy; it was not making an adjudication of any fact on the merits; it assayed only to make a limited decision as to whether equity required the preservation of the status quo on the basis of the sworn complaint, affidavit and testimony adduced before it. Its preliminary determinations nevertheless came to the Court of Appeals insulated by the provisions of Rule 52(a) of the Federal Rules of Civil Procedure. We respectfully submit that in proceeding to their examination of the record the two-judge majority of the appellate court proceeded to redetermine the record facts and concluded that they would have reached a contrary decision. As previously stated, the errors and omissions in their fact analysis are completely documented by the dissenting circuit judge. We respectfully submit, however, that the majority judges' re-examination of the record as a matter of law conflicts with this court's decisions in *U. S.* v. *National Association of Real Estate Boards, supra; U. S.* v. *E. I. DuPont de Nemours & Co., supra,* and *International Boxing Club* v. *U. S., supra.*

For the very narrow purpose of determining whether a preliminary injunction should issue, we respectfully sub-

mit that the record is replete with fact documentation which supports the lower court's exercise of discretion.

3.

The Rights Protected by the First and Fourteenth Amendments Are the Rights of Natural Persons, Not Artificial Corporations

The only Appellant before the Court of Appeals was the corporation, CORE. This was not in anywise a class action and none of the individual defendants appeared in or appealed from the decision of the lower court. No suggestion was made in the Court of Appeals that any derivative rights were being asserted. In *Hague* v. *C.I.O., supra,* this court stated:

> "Natural persons, and they alone, are entitled to the privileges and immunities which §1 of the Fourteenth Amendment secures for 'citizens of the United States'. Only the individual respondents may, therefore, maintain this suit."
>
> * * *
>
> "Since freedom of speech and freedom of assembly are rights secured to persons by the due process clause, all of the individual respondents are plainly authorized by § 1 of the Civil Rights Act of 1871 to maintain the present suit in equity to restrain infringement of their rights. As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons. Northwestern Nat. L. Ins. Co. v. Riggs, 203 U.S. 234, 255, 51 L. Ed. 168, 173, 27 S. Ct. 126, & Ann. Cas. 1104; Western Turf Assoc. v. Greenberg, 204 U.S. 359, 363, 51 L. Ed. 520, 522, 27 S. Ct. 384."

See also *Shelly* v. *Kraemer, supra,* footnote 9, *Communist Party* v. *Control Board,* 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961); *Adams* v. *City of Park Ridge,* (7th Cir., 1961) 293 F.2d 585; *International Ladies G.W.U.* v. *Seamprufe,* 121 F. Supp. 165 (1954); *The Constitution of the U. S.,* Corwin Ed. 1953, p. 809.

CONCLUSION

This case is cast out of character if it be considered as a segregation controversy. It was long past that; it had devolved itself into a very basic peace-keeping issue and the primary determination which the trial judge was called on to make was whether or not basic constitutional rights of free speech required the officials of this municipality to continue to withstand the heavy peace-keeping burden provoked by these continuous publicized provocative demonstrations, which, at the time injunctive relief was granted, had progressed continuously for four days and were threatening to continue as long as the reaction of local individuals could be provoked.

We respectfully submit that not only was the trial judge's discretion not abused in temporarily calling a halt to the publicity aspects of these demonstrations, but a refusal to have imposed at least this stricture would certainly have been an abuse of his discretion.

This court should grant certiorari and review and set aside the judgment of the United States Court of Appeals for the Fifth Circuit issued the 10th day of June, 1963.

Respectfully submitted,

LOUIS ALFORD,
McComb, Mississippi,
WILLIAM A. WILTSHIRE,
P. O. Box 1061,
McComb, Mississippi,

/s/ _____,
CHARLES CLARK,
P. O. Box 1046,
Jackson, Mississippi,
Attorneys for Petitioners.

JOE T. PATTERSON,
Attorney General of the
State of Mississippi,
Jackson, Mississippi,
Of Counsel.

CERTIFICATE OF SERVICE

I, the undersigned, CHARLES CLARK, of counsel for Petitioners, and a member of the Bar of the Supreme Court of the United States certify that a true copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT has been mailed air mail, postage prepaid to: Carl Rachlin, 280 Broadway, New York, New York; Derrick A. Bell, 10 Columbus Circle, New York, New York; and Lolis Elie, 2211 Dryads Street, New Orleans,

Louisiana, in accordance with the requirements of the rules of this Court, on this the 22nd day of July, 1963.

/s/ _____,

CHARLES CLARK,
P. O. Box 1046,
Jackson, Mississippi.

APPENDIX

APPENDIX

The Constitution of the United States

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Amendment IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

Title 28.

§1254. *Courts of appeals; certiorari; appeal; certified questions.*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

§1291. *Final decisions of district courts.*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§1332. *Diversity of citizenship; amount in controversy costs.*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

§1343. *Civil rights and elective franchise.*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

§2072. *Rules of civil procedure for district courts.*

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

§2101. *Supreme Court; time for appeal or certiorari; docketing; stay.*

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Title 42.

§1985. *Conspiracy to interfere with civil rights—Preventing officer from performing duties.*

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the

verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising

any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Federal Rules of Civil Procedure

Rule 52.

FINDINGS BY THE COURT.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 19,724

D. C. Docket No. 3223 Civil

THE CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE,
Appellants,

versus

C. H. DOUGLAS, Individually and As Mayor of the CITY OF McCOMB CITY, MISSISSIPPI, and MR. & MRS. AUBREY McGEHEE,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.
Before Tuttle, Chief Judge, Wisdom and Gewin, Circuit Judges.

Judgment

(Filed June 1, 1963.)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the preliminary injunction of the said District Court in this cause be, and

the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to vacate and set aside the preliminary injunction;

It is further ordered and adjudged that the appellees, C. H. Douglas, individually and as Mayor of the City of McComb City, Miss., and Mr. & Mrs. Aubrey McGehee, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Gewin, Circuit Judge, dissents."

May 15, 1963

A true copy

Test: Edward W. Wadsworth,
Clerk, U. S. Court of Appeals,
Fifth Circuit,

By /s/ Clara R. James,
Deputy.
New Orleans, Louisiana.

Issued as Mandate: June 10, 1963

Recoverable Costs:

Docketing Cause $25.00

CORRECTED

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19724

THE CONGRESS OF RACIAL EQUALITY,
JOHN DOE and MARY DOE,
Appellants,

versus

C. H. DOUGLAS, Individually and As Mayor of the CITY OF McCOMB CITY, MISSISSIPPI, and MR. & MRS. AUBREY McGEHEE,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

(May 15, 1963)

Before TUTTLE, Chief Judge, WISDOM and GEWIN, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal from a preliminary injunction obtained by the Mayor, acting individually and as Mayor of the City of McComb City, Mississippi, and Mr. and Mrs. Aubrey McGehee, the owners of a restaurant in a Greyhound Bus Station against CORE forbidding the defendant from sponsoring, encouraging or financing persons to utilize the terminal facilities in the City of McComb City, Mississippi, "for the purpose of fomenting violence or provoking breaches of the peace in

or near said terminal facilities; or for such purpose after having publicized their purposes and intentions to so utilize or misuse such facilities; or for the purpose of creating or securing unto themselves notoriety and publicity, as the sponsoring organization of such fomentation and provocation; or for the purpose of testing the tempers and reactions of the local citizens of the said City in the absence of local police protection."

Jurisdiction was vested in the district court by way of 28 U.S.C. §1332, diversity of citizenship, the Congress of Racial Equality being incorporated in the state of New York, and all plaintiffs being citizens of the state of Mississippi.

On Monday, November 27, 1961, a preliminary injunction was issued by a statutory three-judge court in the Southern District of Mississippi generally enjoining McComb City and its officials from interfering in any way with compliance by the Greyhound Corporation with the laws of the United States and the regulations of the Interstate Commerce Commission prohibiting racial discrimination in interstate commerce facilities. 6 Race Relations Law Reporter 1169.

All of the evidence in this case come from the testimony of the witnesses for the plaintiffs, including a member of CORE, on direct and cross-examination, the defendants not filing responsive pleadings other than motions to dismiss or offering any of its own witnesses.

Since this is an appeal from a preliminary injunction, and not a final ruling after full hearing on the merits, we must review the district court's injunction on the narrow question of whether that court abused or improvidently exercised its discretion. *Alabama* v. *United States*, 279 U.S. 229, 230 (1929); *Weiner* v. *National Tinsel Manufac-*

turing Co., 123 F.2d 96 (7th Cir., 1941). Unless the plaintiffs make out a prima facie case, a preliminary injunction should not issue. *W. A. Mack, Inc.*, v. *General Motors, Inc.*, 260 F.2d 886 (7th Cir., 1958). An injunction should only be used when it is clear that the question presented by the litigant who seeks the injunction is free from doubt. See *Consolidated Canal Co.* v. *Mesa Canal Co.*, 177 U.S. 296, 302 (1900); *St. Louis St. F. M.* v. *Sanitart St. F. M. Co.*, 161 Fed. 725, 728 (8th Cir., 1908). Furthermore, there must be a balancing of the conveniences and rights of the parties and a balancing of the possible injuries to them according to how they may be affected by the granting or withholding of the injunction. *Meccano, Ltd.*, v. *Wanamaker*, 253 U.S. 136, 141 (1920).

The complaint,[1] the tenor of which is conveyed by

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1. The pertinent parts of the complaint are here set out for easy reference:

"II

"The defendant, Congress of Racial Equality and others associated with them are sponsoring, financing and encouraging John Doe and Mary Doe and others to come into the City of McComb City, after publicizing their intention so to do, in order to foment violence and to provoke breaches of the peace in and around the terminals and facilities used in McComb City for the transportation of passengers, mail and baggage into, through and from the City of McComb City.

"III

"This agitation on the part of John Doe and Mary Doe and others has provoked incidents of violence at the Greyhound Corporation bus terminal in McComb City and was calculated to, did and will continue to provoke future incidents of violence in and around said bus terminal, which said incidents of violence have resulted in great injury and damage to plaintiffs and each of them, and to the City of McComb City, which said damages are in excess of $10,000.00 in amount, exclusive of interest or costs, and are immediate and irreparable.

the language of the preliminary injunction, stated above, claims that such "incidents of violence" which were done in order "to foment violence and to provoke breaches of the peace in and around terminals and facilities" have caused "great injury and damage" to the plaintiffs.

We will examine the evidence, including the inferences to be drawn therefrom, in the light most favorable to the appellees, the winning parties below, in order to determine if the rights of the plaintiffs are "free from

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"IV

"Under and pursuant to a prior order of this court in the case of U.S.A. v. Mayor and Selectmen of McComb City, et al., being Civil Action No. 3215, the police officials and other officials of the City of McComb City have been enjoined from acts which might be construed as interference in any way or by any means with the conduct of the Greyhound Corporation and any and all other persons operating or using said terminals and facilities used in interstate commerce, a true copy of which injunction is attached hereto as Exhibit 'A'.

"V

"The plaintiffs, Mr. and Mrs. Aubrey McGehee, are the operators of the Greyhound Bus Terminal at 206 Canal Street in the City of McComb City, Mississippi, and were, until the acts and activities of the defendants herein forced them to close the same, the operators of a restaurant business in the said Greyhound Bus Terminal building.

"VI

"The acts of the defendants are wilful, intentional, deliberate acts which defendants have publicly announced to the newspaper, radio and television press media that they intend to continue. The defendants will, unless restrained by order of this court, continue to unlawfully sponsor, finance and encourage other persons to come to the said terminal facilities in the City of McComb City for the purpose of fomenting violence and provoking breaches of the peace in or near said terminal facilities in obstruction to and interference with the lawful rights of the plaintiffs, under the Constitution and laws of the United States of America and the State of Mississippi.

doubt"[2] so that this court in reviewing the issuance of the preliminary injunction of the district judge could not say that the district judge abused his discretion.

The testimony discloses the following events: On Tuesday, the day following the issuance of the order of the United States District Court desegregating the terminal facilities of McComb, certain officials of McComb learned that Negro members of CORE were coming from New Orleans to McComb on Wednesday, the next day, in order to use McComb's bus terminal facilities.[3] The members

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"VII

"The plaintiffs have no adequate remedy at law.

"WHEREFORE, Plaintiffs pray this Honorable Court to permanently enjoin the Defendants, their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them, from continuing to unlawfully sponsor, finance or encourage persons to utilize the terminal facilities in the City of McComb City, Mississippi, for the purpose of fomenting violence and provoking breaches of the peace in or near the said terminal facilities.

"Plaintiff prays for such further relief as the interest of justice may require."

2. "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction." Truly v. Wanzer, 5 How. 141, 12 L. Ed. 88.

This is the standard announced by the same district court for the Southern District of Mississippi in denying injunctive relief to Negro plaintiffs in Clark v. Thompson, 206 F. Supp. 539, 543.

3. There is no dispute about the fact that the actions of the members of CORE in this case were for the avowed purpose of testing the segregation previously practiced in the terminal and recently declared invalid by the Federal District Court.

arrived by bus from New Orleans Wednesday morning, as scheduled, but they found the bus terminal closed because of a "gas leak." Their arrival had been announced by various news media, and small groups of whites and Negroes, as well as a few members of the press, were on hand to "greet" the travelers. They arrived at and departed the closed terminal without incident. Members of the McComb police force were present that morning. That afternoon the same CORE members returned to the terminal, but when they got there none of the McComb police force had yet arrived.[4] The crowd was larger this time. A photographer was reported to have been beaten up at or near the terminal by members of the white throng. The number of persons "greeting" the travelers was never determined, but it was clear that the CORE groups *never numbered over five.* The CORE party went into that part of the terminal restaurant, which was formerly only for whites, and asked to be served. The proprietor, who first told them to go to the other part of the waiting room to be served by a woman of their color, testified that they demanded services and that one of them beat on the counter and said, "Why in the hell can't we get service in here." He further testified that violence broke out, although he said he did not know where it came from. One of McComb's Selectmen, a Mr. Gordon, testified that he saw disturbances on Wednesday, but he too could not be specific. He said there were no breaches of the peace, and no refusal by the McComb citizens to obey the police officers, once they got there, although he said the Negroes were "ejected" from the waiting room.

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4. Testimony was that the Chief of Police was informed that these Negroes would return that afternoon at 3:20, but arrived 30 minutes early, and that this was the reason none of his force was there.

He said the Negroes always behaved in an appropriate manner.

Another visit by these CORE members was planned for Friday. The newspapers carried the story on Thursday. Large crowds were again there to meet them, as well as the police force being on hand. They arrived as scheduled and used the terminal facilities without incident. The McComb Chief of Police testified that to his knowledge the CORE members did not behave in a boisterous manner.

On Saturday another visit was scheduled and again there were some greeters at the terminal site, this time not as many as on the previous visits. The reporters and police officers were also on hand. A police officer, Smith, testified that the CORE members behaved "in a reasonably quiet manner," and that the police had the situation under control Friday and Saturday, but that they were needed there to keep order. There were two reported incidents of disturbance on Saturday. A local member of CORE stated that he was struck several times by some person in the terminal; and the other was that two or three of the members of the crowd struck the local CORE official's car, but this stopped at the command of one of the police officers.

It was clear that the rides were publicized, but there is little evidence to indicate how the press got hold of the planned trips. One of the local CORE officials said that he know of no planned publicity. The city officials originally learned on Tuesday of the first trip from an agent of the F.B.I., although how the latter learned is not disclosed. There is no evidence that CORE itself held press conferences to make public statements about the timing of planned rides.

From the three visits on Wednesday, Friday and Saturday, and the above described events, the testimony was that the city was affected in the following manner: Selectman Gordon: "The people of the city were obviously greatly disturbed. They were reluctant to go about their ordinary business. The situation was extremely tense, explosive." But he said the situation got better after Judge Mize's temporary restraining order. The proprietor of the restaurant said he had to close down his restaurant because of the tense situation, although Negroes have used the terminal facilities peacefully and without incident since the CORE visits.

The evidence relative to the conduct of the CORE members was almost entirely favorable. They behaved in an "appropriate manner," never "antagonistic," never "boisterous," and in "a reasonably quiet manner" according to the testimony of three of the plaintiff's witnesses. Only the proprietor of the restaurant said one CORE member demanded service in a loud manner and beat on the counter. The only incidents of malevolent behavior came from the white crowd milling around the terminal. The police officers testified that the crowds obeyed their orders at all times and that they had the situation under control on Friday and Saturday.

The district court found that the CORE members publicized their arrival, and that this was a "widely advertised challenge to the entire community;" that this was with the avowed purpose of testing and provoking the tempers of the community, and to incite disturbances and violence upon themselves, and to taunt and tantalize the community. The court found that their acts were done to provoke others to attack them and to commit breaches of the peace; that these acts were done only for the purpose of disturbing the domestic tranquility of the community for

the financial gain of the defendants. The court then concluded that the right of the Negroes to freely use the terminal was not at issue. But that right "to use and enjoy these facilities carries with it a corresponding duty to behave themselves while doing so. Even the well-recognized constitutional right of free speech does not accord an irresponsible person the right to wrongfully holler 'Fire' in a crowded theatre."

We find upon a close study of all the testimony that the record is completely barren of any evidence of an intent by CORE to provoke breaches of the peace, to incite violence, to disturb the domestic tranquility for CORE's own financial gain, to bring violence upon themselves, or to taunt and tantalize the community. In fact, with the exception of the one incident of demanding service by beating on the counter, the testimony disclosed that the Negroes acted in no way hostile, violent or provoking. At all times they behaved in an orderly fashion. Furthermore, there is absolutely no evidence that CORE "widely advertised" its goings and comings. In any event, regardless of what the findings were with respect to the publicity, it is clear that, whatever part of the injunction is based on "advertising" of the comings and goings of CORE, the injunction must be struck down. The publicity, even if provided originally by CORE, could only be said to be a part of their peaceful efforts to demonstrate. Any violence from the local citizenry which comes from this can only be said to be based on the offensiveness to them of CORE's intention to use McComb's facilities on an integrated basis, and their right to publicize their intentions is no less protected than their carrying them out.

Of course, no court may enjoin conduct which is neither threatened nor imminent. Since there was absolutely no

proof that the respondent threatened to do *anything "for the purpose of fomenting violent or provoking breaches of the peace,"* or "for *such* purpose after having publicized their purposes and intentions to so utilize or misuse such facilities; or for the purpose of creating or securing unto themselves notoriety and publicity, as the sponsoring organization of *such fomentation and provocation,"* the fact that the court issued its injunction in these terms must amount to a determination by it that the *acts proven to have been threatened* justified the issuance of the injunction. The record is clear that the acts proven to have been threatened constituted nothing more than a purpose by CORE to continue to test the previously segregated facilities of the bus station in a peaceful manner.

The Supreme Court has recently spoken in a case which clearly controls the one here before us. In *Edwards* v. *South Carolina,* ——— U.S. ———, 31 U.S.L. Week 4225 (Feb. 25, 1963), the Court reversed the Supreme Court of South Carolina's upholding of the convictions of the common law crime of breach of the peace of 187 Negro students who marched on the South Carolina State House grounds "to submit a protest to the citizens of South Carolina . . . our feelings and our dissatisfaction with the present conditions of discriminatory actions against Negroes, in general, and to let them know that we were dissatisfied and that we would like for the laws which prohibited Negro privileges in this State to be removed. The Negroes marched in small groups through the State Capitol, each group bearing placards of protest, such as "I am proud to be a Negro," and "Down with segregation." The Negroes were warned by the waiting police officers that they would be arrested if they did not

disperse within 15 minutes of the order.[5] Instead of dispersing they sang, clapped their hands and stamped their feet, and listened to a "religious harangue" by one of their leaders. There was testimony that "a dangerous situation was building up" and there was an "imminently threatened disturbance of the peace of the community." A large crowd of white persons had gathered, estimated to be about 300, which had begun to impede vehicular and pedestrian traffic.

In spite of the testimony that the city officials felt that the mob had reached a "fever pitch" and that the demonstrations "tended directly to immediate violence," the Court, upon an "independent examination of the whole record," found that the petitioners had "peaceably expressed their grievances" and "peaceably assembled,"[6] and that "South Carolina had infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances." See also *Field* v. *South Carolina,* —— U. S. ——

Feiner v. *New York,* 340 U. S. 315, is the case heavily relied on by South Carolina in the *Edwards* case and appellees in the case at bar. We find that the facts of this case fit squarely within the factual bounds of the *Edwards* case and fall outside the allowable limitations on First Amendment rights as evidenced in the *Feiner* case.

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5. At first the demonstration was not going to be halted, but according to one city official, when the situation got out of hand and violence appeared to be imminent, he decided that the demonstration should be stopped. This was when the 15 minute directive was given.

6. The Court pointed out that it was not until they were told to disperse on pain of arrest did they do more, and that even then there was no violence or threat of violence on their part, or on the part of any member of the crowd. Furthermore, there was ample police protection.

These cases, and similar others, involve a balancing of First Amendment — Fourteenth Amendment rights[7] with the "power and duty of the state to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents." *Thornhill* v. *Alabama,* 310 U. S. 88, 105 (1940). "It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace." *Feiner* v. *New York,* supra at 321. The Court there upheld the conviction of Feiner for breach of the peace for attempting to arouse the Negro people against the whites, *urging that they rise up in arms and fight* for equal rights. The outstanding difference between this and the *Edwards* case on the one hand and the *Feiner* case on the other is that the element in the latter case of the defendant's *purpose* and *attempts to incite,* and near success thereto, was totally lacking in this and the *Edwards* case.

In view of the facts and circumstances in this case the language of the Supreme Court in *Terminello* v. *Chicago,* 337 U. S. 1, 4, is appropriate:

> "Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettled effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against

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7. These rights are not absolute. Whitney v. California, 274 U.S. 357.

censorship or punishment unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest."

The posture of this case in particular is even more favorable to the defendants than was the *Edwards* case to the defendants therein, in that an injunction is involved here which prohibits the exercise of constitutionally guaranteed rights. It is a prior restraint. As the Court said in *Kunz* v. *New York,* 340 U. S. 290, 295, "We are here concerned with suppression — not punishment," and so are we here in this case. Although the protection against previous restraints on the liberties guaranteed by the First Amendment is not unlimited, it takes on an even more guarded protection than punishment after the exercise thereof. See *Near* v. *Minnesota,* 283 U. S. 697; *Kunz* v. *New York,* supra; *Hague* v. *C.I.O.,* 307 U. S. 496; *Cantwell* v. *Connecticut,* 310 U. S. 296. We find that the injunction below is an unconstitutional abridgement of the First Amendment rights, as protected by the Fourteenth Amendment, as a prior restraint on the freedom of speech.

There was no "clear and present danger"[8] in the case at bar as there was in *Feiner* v. *New York, supra.* The testimony of both the Chief of Police and one of his officers was that at all times they had the crowd under control. The discontent and unrest of the local populace resulting from the unpopularity of racial integration or the offensiveness to them of Negroes organized in a movement to test out the segregation in the bus terminal, are no grounds to prohibit what otherwise would be a constitutionally guaranteed right and freedom, especially in the manner in which the defendants conducted them-

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8. Schenck v. United States, 249 U.S. 47.

selves. "A state may not suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Cantwell* v. *Connecticut*, 310 U. S. 296, 308.

Nor can it be said that the injunction should stand since it does not prohibit the peaceful use of the terminal but only that use for the purpose of "fomenting violence" in McComb, for the injunction must rest on the record made in the case; and we have already held, supra, that the findings of fact by the district court dealing with an intent to foment violence are clearly erroneous and are unsupported by any evidence. The injunction, if allowed to stand, would amount to a complete deterrent to the members of CORE to peacefully demonstrate against the segregation policies of the City of McComb. CORE and other organizations, organized for the purpose of peacefully demonstrating and speaking against unconstitutional state and local laws enforcing segregation, would then find themselves virtually inarticulate. These fundamental rights to speak, assemble, seek redress of grievances and demonstrate peacefully in pursuance thereto cannot be abridged merely because a riot might be threatened to be staged or that the police officers are afraid that breaches of the peace will occur if these rights are exercised.[9]

The grant of the preliminary injunction was a clear abuse of the discretion of the trial court. The case is therefore remanded with directions to the trial court to vacate and set aside the preliminary injunction

Judgment is REVERSED.

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9. Congress of Racial Equality may assert the constitutional rights of its members. See N.A.A.C.P. v. Alabama, 357 U.S. 449.

GEWIN, Circuit Judge, Dissenting:

This case emphasizes the wisdom of the rule that an appellate court should exercise careful and cautious restraint before substituting its judgment for that of a resident trial judge when the judgment under review relates more to the facts proven and the demeanor of the litigants and witnesses, rather than to abstract principles of law. Before stating my reasons for this dissent, I wish to make a general observation by way of preface or preamble.

Nothing said herein is intended to lend comfort or encouragement to those who advocate the use of, or who use brass knuckles and other forms of violence; or to those who undertake deliberately to provoke others to breach the peace or create violence. Trouble-makers do not solve problems. They thrive on trouble and its consequent publicity, confusion, provocation, unrest, condemnation, taunting and jeering behavior. Periods of drastic change call for magnanimous, patient and restrained conduct on the part of all elements of society, especially those who claim to be leaders. It is time for people to realize that a court is not a sovereign alchemist that can transmute violence, hate, distrust, fear, evil intent and prejudice into a rule of right conduct. People must do that themselves with encouragement and aid from the Judiciary.

The number of cases which come before the courts for review are but a handful compared with the numerous contacts and relationships which must take place from day to day amongst people with differing views and conflicting concepts. Minds that are motivated by hatred and evil motives become the repositories of wrongs and the generators of ill-mannered and shameful conduct resulting in obloquy, spoliation and hideous sufferings.

There has never been a better time than *now* for people of different origins, backgrounds and beliefs to look for and emphasize the good qualities in others; and if they refuse to do so, the poisonous infection which will result inevitably is likely to endure for generations. The human mind that is seized and saturated with hatred rarely ever wishes to part with it.

In reversing the lower court, it seems to me that the majority has failed to give proper consideration to two fundamental principles of law which are controlling and recognized by all appellate courts. These principles are:

1. Broad discretion is lodged in trial courts in the matter of issuing temporary restraining orders and preliminary injunctions. The majority has denied any discretion to the District Court and has erroneously, in my judgment, concluded that there was an abuse of discretion. It is a well established principle of law that the trial court who is present where the trouble arises, who sees and hears the witnesses, and who can sense "the feel" of the situation is far better qualified to decide such questions than an appellate court upon review of a cold record. *Howard Hay Foundation* v. *Safety Harbor Sanatorium,* 5 Cir., 1944, 145 F. 2d 661; *Burton* v. *Matanuska,* 9 Cir., 1957, 244 F. 2d 647; *Jimenez* v. *Barber,* 9 Cir., 1958, 252 F. 2d 550; *Bancroft* v. *Shelby,* 3 Cir., 1959, 268 F. 2d 569.

2. Findings of fact by the trial court are presumed to be correct and will not be set aside unless clearly erroneous. Without indulging any presumption whatever in favor of the trial court, the majority has substituted its judgment of the witnesses and the facts for the judgment of the trial court. *U. S.* v. *Dupont,* 100 L. Ed. 1273 (1955); *Peurifoy* v. *Commissioner,* 3 L. Ed. 2d 33 (1958); *Interna-*

tional Boxing Club v. *U. S.*, 3 L. Ed. 2d 279 (1959); *Horton* v. *U. S. Steel Corp.*, 5 Cir., 1961, 286 F. 2d 710. In my view, the necessary findings by the trial court are amply supported by substantial evidence; and the legal conclusions reached are well supported by the facts as found.[1]

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1. A few typical examples of errors of fact contained in the majority opinion follow:

1. *THE OPINION*:

"The evidence relative to the conduct of the CORE members was almost entirely favorable. They behaved in an 'appropriate manner,' never 'antagonistic,' never 'boisterous,' and in 'a reasonably quiet manner' according to the testimony of three of the plaintiff's witnesses."

THE RECORD:

The only time the word "antagonistic" is used relates to a time *subsequent to the issuance of the temporary restraining order.*

"Q. Now, has the situation in your opinion in McComb changed at all from what it was last week?

"A. Yes, sir.

"Q. In what way has it changed? What have you observed about the city this week?

"A. Following the issuance of the temporary restraining order signed by Judge Mize, and when the public became aware of it, the situation cleared up tremendously.

"Q. Did members of the colored race ride a bus into McComb yesterday?

"A. Yesterday? I will have to look. Yes, sir. Yes, of course.

"Q. That would be Wednesday, this past Wednesday, the 6th of December?

"A. Yes, sir.

"Q. Were there any incidents or disturbances?

"A. No.

"Q. Were there any unusual or large crowds gathered at the bus station when the bus arrived bearing these people?

"A. There might have been up to six or eight more people than would be considered normal down there at the time.

"Q. Were they in your opinion antagonistic, or did you observe — let's put it this way, did you observe these people

There is only one appellant, a New York corporation, the Congress of Racial Equality (CORE), and the appellees are C. H. Douglas, Individually and as Mayor of the City of McComb, and Mr. and Mrs. Aubrey McGehee. There is

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that were there, these six or eight that you say would not normally be there? Did they exhibit any antagonistic motions or did they exhibit any antagonism in their voices or manner that you could observe?

"A. No, sir."

2. *THE OPINION*:

"In fact, with the exception of the one incident of demanding service by beating on the counter, the testimony disclosed the Negroes acted in no way hostile, violent or provoking. At all times they behaved in an orderly fashion."

THE RECORD:

"Mr. McGehee said that he was inside the bus station and they approached and started to the counter, to the lunch counter, and he told them, 'That is a private business not operated by the Greyhound Company and you can not use this side of it'. His words were, 'They walked through me and sat down'. He said, 'I followed them and went on the other side of the counter and told them, 'I can not serve you here. This is a private business and I can not serve you. If you will go through that door to the other side we will serve you.' He said at about that time he had to go to the south a few feet to sell a ticket and that — if you will pardon the words, the words he told me — 'all hell broke loose'."

3. *THE OPINION*:

"It was clear that the rides were publicized, but there is little evidence to indicate how the press got hold of the planned trips. One of the local CORE officials said that he knew of no planned publicity."

THE RECORD:

"Q. Mr. Mayor, in the conversation that you had with Mr. Burke Marshall in the U. S. Attorney's Office did he tell you what connection CORE, or the Congress of Racial Equality, had with these people that were coming to McComb?

"A. Not in this particular conversation that we are referring to now.

"Q. In any subsequent conversation that you had with Mr. Burke Marshall?

"A. Yes, sir.

"Q. What did he describe to you to be CORE's part in these activities?

no individual appellant — only a corporate one. Only the appellant CORE is mentioned in the injunctive order.[2] No

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"A. He told me, or his office told me, I don't know whether it was he or Mr. ———— what is the attorney with him?

"Q. Heilbord.

"A. Heilbord — if I had any suggestion to make to them, feel free to do so. And I said to him, I asked him if I could make a suggestion — now, this is Mr. Marshall — and he said yes. I said, 'If we can have these publicized movements discouraged and discontinued it will be a lot of help to us in maintaining and keeping peace and order'. And reference was made to CORE's movements, announced movements, and I said, 'If Washington will use their influence or what influence they have to discourage that it will be helpful'. He said, 'I'll do that today and call you back,' and he called me back and he said that he'd had a telephone conversation with CORE's headquarters and they had promised to *discontinue these publicized movements.* Now, that's what he said to me in a subsequent telephone conversation." (emphasis supplied)

* * * *

"Q. Tell us what the stories that were carried over the regular news media in McComb stated on Thursday with regard to the intentions, if any, of persons who had been in McComb on Wednesday to return to McComb, or particularly to the bus station or train station at McComb.

"A. The Associated Press wire service stated that the five Negroes after their return to New Orleans were engaged in meetings there, and several of them *were quoted in interviews* in which they said that they had no immediate plans at that moment but that they did plan to return." (emphasis supplied)

4. *THE OPINION*:

"CORE and other organizations, *organized for the purpose of peacefully demonstrating* and speaking against unconstitutional state and local laws enforcing segregation, would then find themselves virtually inarticulate." (emphasis supplied)

THE RECORD:

The record is totally silent. Except for motions to dismiss, CORE filed nothing and proved nothing. On this point there are no allegations and no proof.

2. There is the usual provision including ". . . its officers, agents, servants, employees, attorneys and those persons acting in active concert or active participation with them who receive actual notice of this order, by personal service or otherwise."

person but CORE gave notice of appeal. Designation of contents of the record on appeal was given only by CORE. Again, we emphasize that no individual appellant is involved. In spite of this fact, the majority grounds its opinion on the following reason:

> "We find that the injunction below is an unconstitutional abridgment of the First Amendment rights as protected by the Fourteenth Amendment as a prior restraint on the freedom of speech."

This is the first instance I have found where freedom of speech on the part of a corporate defendant is used as the basis for reversing a trial court in circumstances here present. As stated, the appellant CORE filed no pleadings seeking any relief on its own behalf or on behalf of any individual it claimed to represent; and it offered no evidence. There is no suggestion of a class action or the appearance of any litigant in a representative capacity. In *Hague* v. *CIO*, 307 U.S. 496 (1938), the court held:

> "Natural persons, and they alone, are entitled to the privileges and immunities which § 1 of the Fourteenth Amendment secures for 'citizens of the United States'. Only the individual respondents may, therefore, maintain this suit."
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> * * *
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> "Since freedom of speech and freedom of assembly are rights secured to persons by the due process clause, all of the individual respondents are plainly authorized by § 1 of the Civil Rights Act of 1871 to maintain the present suit in equity to restrain infringement of their rights. As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons. Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 234, 255, 51 L.ed. 168, 173, 27 S. Ct.

126, 7 Ann. Cas. 1104; Western Turf. Assoc. v. Greenberg, 204 U. S. 359, 363, 51 L.ed. 520, 522, 27 S. Ct. 384."

See also *Communist Party* v. *Control Board*, 367 U. S. 1-201 (1961); *Adams* v. *City of Park Ridge*, 293 F. 2d 585 (7 Cir., 1961); *International Ladies G.W.U.* v. *Seamprufe*, 121 F. Supp. 165 (1954); The Constitution of the U. S., Corwin Ed. 1953, p. 809. The majority relies heavily on *NAACP* v. *Ala.*, 357 U. S. 449 (1958), but that case has no bearing on the issues here involved. There *NAACP* sought to protect its membership lists and affirmatively asserted such right. The court held that the Association could protect the right of anonymity of its members. The lists were in possession of the Association, and it alone could protect the privacy of them. As held by *Hague* and other cases, the right of free speech can not be asserted by an artificial person. The majority further asserts:

> "The posture of this case in particular is even more favorable to the defendants than was the *Edwards* case to the defendants therein, in that an injunction is involved here which prohibits the exercise of Constitutionally guaranteed rights."

The majority has overlooked the fact that the injunctive order relates only to one corporate defendant.

I am also at a loss to understand how the majority can make the following assertion:

> "CORE and other organizations, organized for the purpose of peacefully demonstrating and speaking against unconstitutional state and local laws enforcing segregation, would then find themselves inarticulate. These fundamental rights to speak, assemble, seek redress of grievances and demonstrate peacefully in pursuance thereto cannot be abridged merely because a riot might be threatened to be staged or

that the police officers are afraid that breaches of the peace will occur if these rights are exercised."

As pointed out in Note 1, CORE filed no responsible pleadings whatever except motions to dismiss; and it offered no evidence. The quoted assertion of the majority is the assertion of a fact unknown to the record. There is absolutely nothing in the record to show the purpose for which CORE was organized, and regardless of that fact, the record does not show that CORE conducted itself on the occasion here involved for the purpose of ". . . peacefully demonstrating and speaking . . ." against certain laws and practices. On the record before us the majority can not, with logic, proclaim the purposes of the corporate defendant and pass upon its conduct on the occasions in question when there is no evidence to support such conclusions of fact. In its erroneous view of the facts, the majority states, "The only incidence of malevolent behavior came from the white crowd milling around the terminal." Throughout the opinion, the majority varnishes the conduct of the Negroes with benevolent descriptive terms, while at the same time characterizes the conduct of the white crowd as malevolent. Such conclusions and characterizations have no foundation whatever in the record. Indeed, the majority opinion gives one the impression that nothing happened and that all was "sweetness and light" in McComb, Mississippi. Such a conclusion is contrary to the assertion of the appellant CORE in its own brief.[3] The use of such descriptive terms

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3. The following is from the brief of CORE at page 3:

"Almost immediately thereafter, in McGehee's words, 'All hell broke out' (R. 115). The negroes were forcibly ejected from the terminal by members of the crowd (R. 85). On the following day, as a result of that incident, four residents of McComb were arrested for 'disturbing the peace' (R. 86, 101).

as "All hell broke out", the arrest of 4 residents of McComb for "disturbing the peace", the receipt of a telegram from the Justice Department requesting police protection, publicized movements with the presence of photographers, T. V. cameramen, and news reporters from distant cities, the presence of fists and brass knuckles, the attempt to break the window of a car, beating upon the counter and using provocative language, and other similar incidents, defy the description contained in the majority opinion.

As a matter of fact, not only were the police officers and the officials of the City of McComb alerted and disturbed, the record clearly shows that they were informed of the impending actions by agents of the F.B.I.[4] The

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"On the same day, after receiving a telegram from the Justice Department (R. 218) requesting police protection at the terminal, the Selectmen of the city authorized the police to patrol the terminal on a regular basis (R. 103-4, 209).

"On Friday a field representative of CORE met the 1:30 bus from New Orleans (R. 175) and picked up a group of five Negro passengers (R. 178) without incident (R. 178-9). The negroes returned to New Orleans on the 3:30 bus (R. 185).

"On Saturday, December 2d, the field representative of CORE met negro passengers, all natives of McComb (R. 182) who had arrived from Jackson, Mississippi. The negroes left the bus and used the terminal without incident (R. 187) but as they entered the auto of the CORE representative a crowd that had gathered beat the auto with fists and brass knuckles, kicked the sides and attempted to break the window of the car (R. 188). A police officer intervened and the beating stopped (R. 188)."

4. The following is from the record, pp. 204-5 and 206-8:

"Q. On Tuesday evening, November 28, 1961, did you receive a telephone call from any member of the Federal Bureau of Investigation?

"A. I did.

"Q. Who was that man who called you?

"A. Jack Quigley.

"Q. Speak up a little.

"A. Mr. Jack Quigley.

local officers were also confronted with a restraining order issued on November 27, 1961, by a three judge court which resulted in some reluctance on the part of such officers to exercise any authority whatever. This feeling of restraint necessitated a call from these officials to the Justice Department in order to obtain advice and perhaps permission, as to what local police officers would be permitted to do. Indeed, the situation was discussed

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"Q. And what did he tell you on that occasion?

"A. He informed me that CORE was planning another ride for the next day to McComb.

"Q. Now, you say another ride. This would have actually been the first one?

"A. The first ride to McComb.

"Q. This would have been for the next day, which would have been a Wednesday, is that right, sir?

"A. Correct.

"Q. Now, on Wednesday did a group of people come into the McComb—a group of colored people come into the McComb bus terminal from New Orleans?

"A. They did.

"Q. Was this in accordance with your information from Mr. Quigley?

"A. Yes, sir."

* * * *

"Q. Was Mr. Quigley at that time in McComb, Mississippi?

"A. Yes, sir, he had arrived in McComb.

"Q. At any time during the day of Wednesday, the 29th of November, 1961, did Mr. Quigley contact you with any message as to the intent or intentions of this group of persons?

"A. Yes, sir, he did.

"BY MR. RACHLIN: I wish to clarify the question.

"BY THE COURT: Let me get that question again.

(The reporter read the last question and the last answer)

"BY MR. CLARK: If Your Honor please, I am again emphasizing to you that it is not my purpose by this question to prove what these intentions were, but simply to prove the fact that this police officer received a communication on that day from another police officer and what that communication was.

"BY THE COURT: I overrule the objection.

"BY MR. CLARK (Continuing):

by the local officers and Honorable Burke Marshall, Assistant Attorney General, Chief of the Civil Rights Sec-

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"Q. Did he contact you and tell you what these persons planned to do?

"A. He did.

"Q. What did he tell you that they planned to do?

"A. He told me that he had been in contact with these people that came in on the bus and their intentions were to go to the bus station at 3:20 or 3:25 and catch the 3:30 bus out of McComb.

"Q. All right, sir. Now, while Mr. Quigley was there in your office, or in the City Hall where your office is located, do you know whether any of these persons did come to the bus station?

"A. I did not know at that time.

"Q. What was the first indication that you had that they were at the bus station, these five colored persons that had come in that morning?

"A. Mr. Quigley came back to my office, he called me out in the hall and told me that there had been a fight at the bus station, that I had better get down there and see about it.

"Q. All right, sir, now, what time was it that Mr. Quigley told you that?

"A. Shortly after three o'clock.

"Q. And then did you go and investigate the fight?

"A. I did.

"Q. What did that investigation disclose to you as to whether or not these five persons had come back about thirty minutes before they told you they were coming?

"A. When I arrived on the scene all the persons involved—

"Q. When you were told that they were coming.

"A. —they had gone, and I immediately tried to find them. I looked all afternoon and it was six o'clock that afternoon before I did find them.

"Q. Did you find those persons to be the same five colored people that rode in from New Orleans?

"A. They were, yes, sir.

"Q. So it was your investigation that morning from the Federal Bureau of Investigation that they would not be at the bus station until 3:25?

"A. That's correct.

"Q. But apparently they did not go there at that time?

"A. They apparently jumped the gun. That's what they did."

tion of the Department of Justice. The following telegram was in evidence:

> "In confirmation of our telephone conversation this morning you may be assured that the court order of November 27 does not in any way prohibit police action to protect persons using the bus terminals affected by the order. In our opinion the police of McComb are not only free but have a duty to take whatever steps are necessary, including the patrolling of the premises and the dispersal of crowds. The order and the Federal law contemplate that the police will provide the same protection to persons using the facilities of the bus terminals as is given to other citizens in the city. They may do so by any preventive or other means which do not have the purpose or effect of coercing racial segregation or interfering with the exercise of the rights protected by the order. You may be assured of our desire to cooperate and to be of assistance to the city in any way that we can in order to protect the safety of interstate travelers and to permit peaceful compliance with the order of the court and the law.
> Burke Marshall Asst Atty Gen Civil Rights Dic."

The majority has held that notwithstanding the testimony about hell breaking loose; fisticuffs and boisterous conduct; the presence of the F.B.I. who alerted local police officers of coming events; a telephone conversation between local police officers and the Justice Department, and a telegram from the Justice Department, there was yet no evidence to support a reasonable inference that violence and public disturbance provoking a breach of the peace were involved. This conclusion is reached by the majority in the face of the fact that two experienced U. S. District Judges[5] had acted, one granting a tempo-

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5. Judge Mize issued a temporary restraining order on the 2nd day of December, 1961; and Judge Cox issued a preliminary injunction on the 22nd day of December, 1961.

rary restraining order and the other a preliminary injunction.

If the situation had gotten out of hand; if the local police officers had refused to act; if the resident U. S. District Judges had refused to grant relief, the evidence indicates that people would have been injured and property would have been destroyed,[6] in which event there would have been a hue and cry, no doubt, that local officers did not believe in "law and order", and wilfully refused to perform their duty.

The majority places great emphasis on the case of *Edwards* v. *South Carolina*, 9 L. Ed. 2d 697, but the opinion has misconstrued that decision. In the Edwards case the court was careful to point out:

> "There was no evidence to suggest that these onlookers were anything but curious and no evidence at all of any threatening remarks, hostile gestures or offensive language on the part of any member of the crowd."

In the instant case, both groups, Negro and White, were more than curious; there were threatening remarks, hostile gestures and offensive language. If not, why the concern of the F.B.I. and the Chief of the Civil Rights Section of the Justice Department in Washington, D. C.?[7]

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6. As shown by the testimony of witness Gordon:

"Q. If this temporary restraining order is removed do you think that burden—do you believe as the police commissioner that that burden will return to the police force?

"A. If the temporary restraining order is removed and these people come back in to visit that bus station *chaos will result.* (emphasis supplied)

"Q. Do you believe that it will place a burden on your police force in McComb?

"A. An intolerable burden."

7. The record is replete with incidents of violence and potentially explosive situations among which are the following:

Finally, the only order before us for review is one enjoining a corporate defendant ". . . from sponsoring, encouraging or financing persons to utilize the terminal facilities . . . for the purpose of fomenting violence or provoking breaches of the peace in or near said terminal facilities; or for such purpose after having publicized their purposes and intentions to so utilize or misuse such facilities; or for the purpose of creating or securing unto themselves notoriety and publicity, as the sponsoring organization of such fomentation and provocation; or for the purpose of testing the tempers and reactions of the local citizens of said City in the absence of local police protection."[8] Expressly excluded from the operation of

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In response to a question concerning the investigation made of a disturbance on Wednesday, the first day that the CORE members came in, the police commissioner of McComb testified:

> "They disclosed that a photographer had been taking pictures in the vicinity of the bus station all day and that about 2:00 o'clock p.m. he was in the vicinity of the bus station, he was questioned and a fight developed between him and one or more persons also there."

Police Chief George Guy testified to 5 negroes being beaten and ejected from the bus terminal on Wednesday at a time when the police department was investigating the photographer fracas above mentioned.

Witness McGehee testified that one of the 5 negroes who were ejected beat upon the counter of the bus terminal restaurant with a knife and in a loud provocative voice demanded: "Why in the hell can't we get service in here?"

The police chief testified that four men were arrested and charged with assault and battery on Thursday in connection with the fight in the bus station on Wednesday.

On Friday, a photographer was seen being chased through town:

> ". . . I did observe a man running pell mell northward carrying a camera in his hand with a crowd of people chasing him on both sides of the street. I did also observe various, many repeated assemblies in small groups of people during the day."

8. Although the majority considers it of no importance, it is a fact that the F.B.I. informed the Chief of Police of the City of McComb that these Negroes would return at 3:20, but actually they came 30 minutes early, and arrived before the police.

the injunction is ". . . any impingement upon the *normal, usual* or *ordinary travel* of any person in *interstate* or *intrastate* commerce to, through or from the City of McComb, Mississippi,."[9] (emphasis supplied). Only unlawful conduct is enjoined — normal conduct is guaranteed by the order.

I would AFFIRM.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
(Seal) By /s/ G. J. Ganuchean
Deputy

New Orleans, Louisiana, June 26, 1963.

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9. There is evidence in the record that the facilities formerly used by white persons had been used by negroes for months without incident until the occurrence of the events under review:

"Q. Over what period of time have you noticed colored persons entering into the west side or what was *formerly designated as the white waiting room in the terminal there*? How long had this been going on? (emphasis supplied)

"A. Mr. Clark, I don't believe I can answer your question. It has been quite a while.

"Q. Could you give me some general estimate as to whether it has been in the term of months or years?

"A. I had rather say months, but I can't be sure about that. I had rather say months.

"Q. Have you ever seen violence as a result of colored people coming into that terminal?

"A. No, none.

"Q. Has there been any publicity about these former visitors in this white side of the waiting room, or what used to be the white side of the waiting room?

"A. No, sir.

"Q. So that prior to this time there have been colored people in there without incident?

"A. Yes, sir. I'm thinking, or my judgment is that we were notified that those people were coming there as agitators. This was what I have learned later, that they notified the people that they were coming there as agitators and to create a disturbance, which I think they have done. They did it up brown."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3223

DOUGLAS, ET AL,
PLAINTIFFS

vs.

THE CONGRESS OF RACIAL EQUALITY, INC., ET AL,
DEFENDANTS

The Plaintiffs in this case sued for an injunction to restrain the Defendants from conduct designed and intended to provoke breaches of the peace at a bus terminal in McComb. A temporary restraining order was granted the Plaintiffs by Honorable Sidney C. Mize, United States District Judge, Southern District of Mississippi. That restraining order was extended by the writer due to the fact that business of the court prevented earlier examination and study of the briefs of the parties considered by them applicable to this case. The Defendants filed four motions which have been separately disposed of by the Court. The conflicting contentions about the nature and character of this case seems to account for the conflicting viewpoints. This case does not in anywise or to any extent conflict with United States of America v. The City of McComb, et al, No. 3215, or anything done by the Court in that proceeding. Nobody denies or even questions in this case the right of any of these Defendants to the free and unrestricted use of all facilities at the bus terminal, or their presence at, in, or near the terminal. This proceeding assails the asserted right of these Defendants to

deliberately provoke and incite acts of violence on and against them at this terminal and in this municipality. It is the conduct of the Defendant and its associates which is calculated and intended and deliberately done to disturb the tranquility and disrupt business in this municipality that is the object of this proceeding to restrain. The Plaintiffs are here seeking a temporary injunction against such wrongful acts of the Defendants. The case is here on verified complaint with supporting affidavit. No answer was filed by the Defendants thereto. The Plaintiffs put on oral testimony before the Court in additional support of said application. At the conclusion of such testimony of the Plaintiffs, the Defendants rested. Accordingly, the Court makes its findings of fact and conclusions of law based thereon.

FINDINGS OF FACT.

The Plaintiff C. H. Douglas is Mayor of the City of McComb. He sues in this case individually and in his said official capacity. Aubrey McGehee, et ux, operated the restaurant in the Greyhound Bus terminal until it was closed as a result of acts of violence deliberately fomented and sponsored with the active assistance of The Congress of Racial Equality, Inc. This Defendant is charged with "sponsoring, financing, and encouraging John Doe and Mary Doe and others to come into the City of McComb City, after publicizing their intentions so to do, in order to foment violence and to provoke breaches of the peace in and around the terminals, etc." The testimony and the reasonable inferences therefrom lead the Court to such inescapable conclusion and such is found to be the facts on this hearing. Several people, composing what The Congress of Racial Equality called a "project". publicized their arrival at this terminal. Their goings and comings were so widely advertised as a challenge to the

entire community that it was covered by news media from Jackson and even ones outside this State. They came to McComb for the avowed purpose announced in advance of testing the tempers of the community which upon arrival they deliberately set about to provoke; and to incite disturbances and violence upon themselves as a part of their desired and intended goal.

Colored people in their good faith pursuit of proper business activities have used all of the white facilities in this terminal during the past several months without notice or incident or objection thereto. But the provocative acts and conduct of the members of these projects of the Defendant from Louisiana have caused violence. Significantly, there has been no violence of any kind since the restraining order in this case although the Court understands that law abiding citizens of both races are enjoying every right and privilege accorded them without any discrimination whatsoever. The Defendant heatedly contends that it has the vested right to continue to hurl its challenges and taunt and tantalize this community in this fashion. It may not have been unlawful per se for the rude female mercenary to shout at the restaurant operator to know "why in the hell he did not give her service," but her acts under the circumstances as a member of this project of the Defendants were deliberately done to provoke others to attack her and thus engage in violence and breaches of the peace in violation of the ordinances of the City of McComb and the statutes of the State of Mississippi. That kind of misconduct on the part of any person or corporation cannot be tolerated in any organized society and civilized community. It certainly finds no protection in any guaranty accorded any such agitators by the Constitution of the United States as they claim. This unwarranted activity of this Defendant placed

an unlawful burden upon that community through the agitators in these projects of the Defendant and the evidence shows that such activities will continue unless enjoined. These missions of the Defendant are not designed or intended in the public interest but are done for the sole purpose of disturbing the domestic tranquility of the community for its own financial gain. The Court further finds that it has jurisdiction of the parties and the subject matter and that the jurisdictional amount necessary to give this Court jurisdiction of this case is as stated in good faith in the Complaint and that the attack on the jurisdiction of the Court lacks factual support and is without merit.

CONCLUSIONS OF LAW.

No right of any person to the free and unrestricted use and enjoyment of all fully integrated facilities at the McComb terminal is in anywise involved in this suit. The right of every person regardless of color is accorded full recognition and respect herein but it is the duty of this Court to see that the rights of others and particularly the community are not violated by organized agitators. Any person can travel for any lawful purpose and use any facility at any terminal but that is not the problem before this Court in this case. The right to use and enjoy these facilities carries with it a corresponding duty to behave themselves while doing so. Even the well-recognized constitutional right of free speech does not accord an irresponsible person the right to wrongfully holler "Fire" in a crowded theatre. That announcement has been one of the classics of jurisprudence in this Nation.

There is presented to this Court more than the mere probability for the necessity and the propriety of injunctive relief to this community from these projects of this Defendant.

It is the considered judgment and opinion of this Court that the Plaintiffs are entitled to process of this Court to enjoin such continued course of wrongful conduct and misbehavior on the part of The Congress of Racial Equality, Inc., and its associates and the conduct of its program of "projects" being sent into McComb for provocative purposes for its financial gain and to the hurt of the Plaintiffs. An order accordingly may be presented for entry.

This December 22, A. D., 1961.

/s/ Harold Cox

United States District Judge.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and As Representative of Her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi,

Petitioners,

vs.

THE CONGRESS OF RACIAL EQUALITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

C. H. Douglas; Mrs. Aubrey McGehee, Individually and As Representative of Her Deceased Husband, Aubrey McGehee; and R. Gordon Burt, Jr., Mayor of the City of McComb City, Mississippi,

Petitioners,

vs.

The Congress of Racial Equality,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court for the Southern District of Mississippi are appended to the petition. The opinion of the Court of Appeals for the Fifth Circuit, together with the dissenting opinion, is reported in — F. 2d —, and is appended to the petition.

JURISDICTION

The jurisdictional requisites are adequately stated in the petition.

STATEMENT OF FACTS

On Monday, November 27, 1961, a preliminary injunction was issued by a statutory three-judge Court, sitting in the Southern District of Mississippi. 6 Race Rel. Rep. 1169. The order generally enjoined the Mayor and Selectmen of McComb City from interfering in any way with compliance by the Greyhound Corporation with the laws of the United States and the regulations of the Interstate Commerce Commission prohibiting racial discrimination in the facilities of interstate commerce (R. 23, 27, 36).

On Tuesday, November 28th, "White Only" signs were removed from the bus terminal (R. 93).

On the same day, the Chief of Police of McComb City learned from an agent of the Federal Bureau of Investigation that negro members of Congress of Racial Equality (hereinafter "CORE") would visit the city on the following day (R. 204-8). The next morning, when a group of five negroes arrived by bus at the depot a large crowd had already gathered (R. 71, 73, 77, 136). On that occasion, police were not present in the bus station (R. 127).

The negroes found the bus terminal restaurant closed presumably because of a gas leak (R. 73). The group left but returned shortly after 3 P.M. (R. 207). They entered the terminal and went to the "white" lunch counter, sat and requested service from Aubrey McGehee, co-appellee and lessee of the restaurant facilities (R. 140). Mr. McGehee testified he had never served colored people before, nor had any "white" restaurant in McComb (R. 142, 148).

McGehee's testimony indicated that he informed the group that his restaurant was * * * "not connected with

Greyhound", and that if they would go to the "colored part * * * a woman of your color will serve you anything you want over there" (R. 140-1). He also stated that one of the women in the group asked belligerently why they couldn't "get service here" (R. 141, 144)? There was no testimony as to any other belligerent conduct (R. 74).

Almost immediately thereafter, in McGehee's words, "all hell broke out" (R. 115). The negroes were forcibly ejected from the terminal by members of the crowd (R. 85). There was testimony that if the police had been present, they could have prevented the incident (R. 209-210). On the following day, as a result of that incident, four residents of McComb were arrested for "disturbing the peace" (R. 86, 101).

The same day, after receiving a telegram from the Justice Department (R. 218) requesting police protection at the terminal, the Selectmen of the city authorized the police to patrol the terminal on a regular basis (R. 103-4, 209).

On Friday a field representative of CORE met the 1:30 bus from New Orleans (R. 175) and picked up a group of five negro passengers (R. 178) without incident (R. 178-9). The negroes returned to New Orleans on the 3:30 bus (R. 185).

On Saturday, December 2nd, the field representative of CORE met negro passengers, all natives of McComb (R. 182) who had arrived from Jackson, Mississippi. The negroes left the bus and used the terminal without incident (R. 187), and in a quiet manner (R. 200) but as they entered the auto of the CORE representative a crowd that had gathered beat the auto with fists and brass knuckles,

kicked the sides and attempted to break the window of the car (R. 188). A police officer intervened and the beating stopped (R. 188).

On the same day a complaint by the City of McComb and Mr. and Mrs. Aubrey McGehee was filed against CORE and John and Mary Doe as defendants (R. 2). A temporary restraining order was signed by District Court Judge Mize (R. 16) and after a hearing before Judge Harold Cox, a preliminary injunction was issued on December 22nd, 1961 (R. 242) enjoining defendant CORE and its officers, agents, servants, employees and attorneys, from "sponsoring, encouraging or financing persons to use the terminal facilities located in the city of McComb City * * * for the purpose of fomenting violence or provoking breaches of the peace in or near said terminal facilities" (R. 245). On appeal, the Court of Appeals for the Fifth Circuit reversed, and it is the latter judgment of which petitioners seek review in this Court.

QUESTIONS PRESENTED

a. Does a peaceful use of interstate bus facilities by small groups of members of Congress of Racial Equality present a clear and present danger of disturbance of the peace?

b. Is an injunction against a peaceful use of interstate bus facilities a prior restraint on freedom of speech?

c. May Congress of Racial Equality assert the rights of freedom of speech and assembly?

d. Did the Court of Appeals apply the proper scope of review of the facts in holding that in order to reverse, it must find that the trial court abused its discretion?

ARGUMENT

This petition for certiorari is one more dilatory tactic by the City of McComb, Mississippi, in a campaign to delay giving Congress of Racial Equality and its members the right freely to use interstate bus facilities at McComb. The "questions presented" are hardly questions at all; the allegations of law are without substance. The use of the bus facilities at McComb was completely peaceful on the part of members of CORE, there was no danger of any kind from CORE, let alone "clear and present" danger. The injunction was more than a simple interference with speech, it was a prior restraint of speech, as evidenced by the simple fact that members of CORE have not been in the McComb bus station since 1961. The assertion that CORE has no right of freedom of speech or assembly is contrary to all the decisions on the point in this Court. Finally, the statement that the court below applied the wrong standard of review is astonishing, since that court applied a standard laid down by this Court, and indistinguishable from the standard advocated in the petition herein.

No Substantial Question of First Amendment Rights Is Presented

There are no issues presented by this case with regard to the right of freedom of speech and assembly which have not been settled by previous decisions of this Court, as correctly interpreted by the Court of Appeals below.

a. There Is No Issue of Clear and Present Danger

The Court of Appeals correctly concluded that the decision in *Edwards* v. *South Carolina,* 372 U. S. 229 (1963)

controls this case. Here, as in that case, persons, in this case members of CORE, were assembled for purposes of a peaceful protest against segregation. In this case, as in that, a crowd had gathered to watch and possibly to interfere. In this case, as in that, the testimony was that the police, whenever they were present, were always able to control the crowd. This case differs from the *Edwards* case, if at all, only in the fact that in this case there was some little violence *against the defendants* on two occasions: on Wednesday, November 29, 1961, when negroes were ejected from the bus terminal by the crowd, and on Saturday, December 2, 1961 when the crowd attacked the car in which the protesting negroes were sitting. In the first case, there was testimony that the police could have prevented the violence if they had been present (R. 209), and in the second case they actually did disperse the crowd (R. 188). The mere fact that there has been a disturbance is not enough to justify interference by injunction, if the defendants have not caused or incited the disturbance. In *Terminiello* v. *City of Chicago,* 337 U. S. 1 (1949), the defendant had made a speech which caused a disturbance because of the violent opposition to it. This court reversed his conviction for disorderly conduct, saying:

> "Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and pre-conceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky v. N. H.,

> pp. 571-72, is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest." 337 U. S. at 4.

To argue otherwise is to deny the existence of free trade in ideas, the very basis of freedom of speech.

The Court of Appeals correctly ruled that there was no incitement to riot by the protest, as there was in the case of *Feiner* v. *New York,* 340 U. S. 315 (1951). Petitioners seem to argue (Petition p. 15) that publicity given to the use of the bus facilities by members of CORE would be tantamount to inciting to riot, but it is unnecessary to reach that question, because the Court of Appeals found that there was no showing on the record that CORE did publicize the protest (R. 66-71), or "widely advertise" it, as charged in the findings of fact of the trial court. The Court of Appeals said further:

> "* * * In any event, regardless of what the findings were with respect to the publicity, it is clear that, whatever part of the injunction is based on 'advertising' of the comings and goings of CORE, the injunction must be struck down. The publicity, even if provided originally by CORE, could only be said to be a part of their peaceful efforts to demonstrate. Any violence from the local citizenry which comes from this can only be said to be based on the offensiveness to them of CORE's intention to use McComb's facilities on an integrated basis, and their right to publicize their intentions is no less protected than their carrying them out." (petition p. A16)

b. There Is No Question That the Injunction Is a Prior Restraint on Freedom of Speech

The petitioners argue that the Court of Appeals was in error in finding the temporary injunction a prior restraint on freedom of speech, because the basis of the injunction, if any there be, was common law and Federal equity power, rather than statute. Petitioners attempt to distinguish *Thomas* v. *Collins,* 323 U. S. 516 (1945), in which this Court held a temporary restraining order to be a prior restraint on freedom of speech, on the ground that the order in that case was based on a statute. This is a useless distinction; in *Thomas* v. *Collins, supra* this court found a prior restraint on freedom of speech in the terms of the restraining order itself, though the statute might have been constitutional if properly applied. 323 U. S. at 528-529. In *Near* v. *Minnesota,* 283 U. S. 697, 714 (1931), this Court, in outlining the history of the rule against prior restraints on freedom of speech showed that prior restraints first arose when the courts enjoined libel *in the absence of statute.* If the reports are not replete with decisions on injunctions against speech issued pursuant to general equity power rather than pursuant to statute, it is because there has been no such distinction since the very inception of the rule against prior restraints on freedom of speech.

c. There Is No Question as to the Right of the Congress of Racial Equality to Raise an Issue of Freedom of Speech

The Court of Appeals held correctly that CORE might raise the Constitutional rights of its members under the decision of this court in *N. A. A. C. P.* v. *Alabama,* 357

U. S. 449 (1958).* This position has been consistently maintained by this court in that and other decisions, *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 428 (1963); *Louisiana* v. *N. A. A. C. P.,* 366 U. S. 293, 296 (1961), and it has further been held that an organization such as CORE, which is directly engaged in activities of speech and assembly, may assert the right on its own behalf. *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 428 (1963); *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244 (1936). If the rule were as the petition states it (Petition p. 23), no incorporated publication or moving picture company could assert the right. Cf. *Kingsley International Pictures Corp.* v. *Regents of Univ. of New York,* 360 U. S. 684 (1959).

The quotation cited in the petition in support of this proposition (which is characterized as a statement of "this court"), is actually an extract from a separate opinion by Justice Stone, in which Justice Reed concurred, in *Hague* v. *C. I. O.,* 307 U. S. 496, 527 (1938), which states only that a corporation may not assert freedom of speech under the Privileges and Immunities Clause of the Fourteenth Amendment, because it is not a "citizen". It is not disputed that freedom of speech may be asserted under the Due Process Clause of the same amendment, see *Grosjean* v. *American Press Co.,* 297 U. S. 233, 244 (1936), and

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* This action was originally brought against "Congress of Racial Equality, John Doe and Mary Doe." It is plain, then, that petitioners originally intended this action to run against individuals, members of CORE, as well as against the organization. This state of the facts cannot be changed now by drawing the petition herein against CORE alone.

it is perfectly clear that the Court of Appeals did not base its opinion on the privileges and immunities clause, but on the Fourteenth Amendment generally.

There Is No Question That the Court Below Applied a Correct Standard of Review

Petitioners argue that the Court of Appeals determined the facts *de novo,* a procedure which is alleged to be improper on an appeal from a preliminary injunction. Yet the Court of Appeals stated the standard of review for this case in nearly the same terms that the petition has advocated:

> "Since this is an appeal from a preliminary injunction, and not a final ruling after a full hearing on the merits, we must review the district court's injunction on the narrow question of whether that court abused or improvidently exercised its discretion. * * *" (p. A9 of Petition)

This is the standard laid down by this Court in *Alabama* v. *United States,* 279 U. S. 229, 230 (1929); thus it seems that everyone, the petitioners, the Congress of Racial Equality, and this Court, is really in agreement as to the standard for review of facts by an appeals court. Surely there is no need for further review by this Court of such well-established principles.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1963

RECEIVED
JUL 24
VLADECK & ELIAS

BURT, ET AL.
Petitioner,
vs.
THE CONGRESS OF RACIAL EQUALITY

No. 301

To Carl Rachlin, Derrick A. Bell & Lolis Elie, *Counsel for Respondent* :

YOU ARE HEREBY NOTIFIED that the petition for writ of certiorari in the above-entitled and numbered case was filed in the Supreme Court of the United States on the 24th day of July, 1963

The record filed pursuant to the requirement of Rule 21 (1) consists of:

The entire record as printed for the U. S. Court of Appeals for the Fifth Circuit.

(If the record was printed for the use of the court below, state here whether you have or have not filed nine copies as permitted by Rule 21 (4).)

Counsel for Petitioner.

Form 75 (1-58—10M)

IN THE SUPREME COURT OF THE

UNITED STATES

October Term 1963

C. H. DOUGLAS: MRS. AUBREY McGEHEE,
Individually and as Representative
of her Deceased Husband, Aubrey McGehee;
and R. GORDON BURT, JR., Mayor of the
City of McComb City, Mississippi, MOVANTS

vs.

THE CONGRESS OF RACIAL EQUALITY, RESPONDENT

MOTION FOR PERMISSION TO CONTINUE
AND MAINTAIN PETITION FOR CERTIORARI

COME NOW C. H. Douglas and R. Gordon Burt, Jr., by their attorneys, and respectfully move this court to allow R. Gordon Burt, Jr., the duly elected, qualified and serving Mayor of the City of McComb City, Mississippi, to continue and maintain this action as the Mayor of said city in the place and stead of C. H. Douglas and, in support hereof, would show that movant, R. Gordon Burt, Jr., succeeded the movant, C. H. Douglas, as said Mayor. There is a substantial need for so continuing and maintaining this action, since the petition seeks to have this court overturn a decision of the U. S. Court of Appeals for the Fifth Circuit which will seriously prejudice peace-keeping activities of the City of McComb City to the damage of the municipality as well as its inhabitants.

Respectfully submitted,

LOUIS ALFORD
WILLIAM A. WILTSHIRE
McComb, Mississippi

CHARLES CLARK
P. O. Box 1046
Jackson, Mississippi

ATTORNEYS FOR C. H. DOUGLAS and
R. GORDON BURT, JR., Movants.

PROOF OF SERVICE

I, CHARLES CLARK, one of the attorneys for C. H. Douglas and R. Gordon Burt, Jr., Movants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 22nd day of July, 1963 I served copies of the foregoing motion on the Respondent thereto by mailing copies in duly addressed envelopes with airmail postage prepaid to Respondent's attorneys of record, as follows: To - Carl Rachlin, 280 Broadway, New York, New York; Derrick A. Bell, 10 Columbus Circle, New York, New York; and Lolis Elie, 2211 Dryads Street, New Orleans, Louisiana, in accordance with the requirements of the rules of this Court.

CHARLES CLARK
P. O. Box 1046
1741 Deposit Guaranty
Bank Building
Jackson, Mississippi

In Supreme Court of the U.S.

STATE OF NEW YORK)
: SS:
COUNTY OF NEW YORK)

CAROL RUBIN, being duly sworn, deposes and says that she is the secretary to Carl Rachlin, the attorney for the respondent herein. That on the 19th day of August, 1963, she served Brief for Respondent in Opposition upon Louis Alford, Esq., William A. Wiltshire, Esq., Charles Clark, Esq., attorneys for petitioners and Hon. Joe T. Patterson, Attorney General of the State of Mississippi, by depositing true copies of the same securely enclosed in post-paid wrappers in a Post Office Box regularly maintained by the United States Government at 280 Broadway, in said County of New York, directed to said attorneys as follows:

LOUIS ALFORD, ESQ.
McComb
Mississippi

WILLIAM A. WILTSHIRE, ESQ.
P. O. Box 1061
McComb, Mississippi

CHARLES CLARK, ESQ.
P. O. Box 1046
Jackson, Mississippi

HON. JOE T. PATTERSON
Attorney General of the
State of Mississippi
Jackson, Mississippi

those being the addresses designated by them for that purpose upon the preceding papers in this action, or the places where they then kept an office between which places there then was and now is a regular communication by mail.

Deponent is over the age of 21 years.

Sworn to before me this
19th day of August, 1963.

SHELDON ENGELHARD
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-1117350 Queens County
Cert. filed in New York County
Term Expires March 30, 195

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

C. H. DOUGLAS, Individually and as MAYOR OF THE CITY OF McCOMB CITY, MISSISSIPPI, and MR. AND MRS. AUBREY McGEHEE, Plaintiffs	)	
v.	)	No. 3223
THE CONGRESS OF RACIAL EQUALITY, JOHN DOE AND MARY DOE, Defendants	)	

MOTION AND NOTICE
FOR SUBSTITUTION OF PARTIES

TO: Carl A. Rachlin, Esq.
280 Broadway
New York 7, New York

Derrick A. Bell, Esq.
10 Columbus Circle
New York 19, New York

ATTORNEYS OF RECORD FOR DEFENDANTS,
The Congress of Racial Equality,
John Doe and Mary Doe.

You are hereby notified that at 9:00 o'clock A.M. on November 15, 1963 at the U. S. Court House in Jackson, Mississippi, plaintiffs will move this Honorable Court for an order substituting Mrs. Aubrey McGehee as the Representative of Aubrey McGehee, Deceased, as a party in the above styled action; and plaintiffs will further move for the substitution of R. Gordon Burt, Jr. in the place and stead of C. H. Douglas in his representative capacity, for the reason that C. H. Douglas has ceased to hold the office of Mayor of McComb City, Mississippi and has

been succeeded in that office by the said R. Gordon Burt, Jr.

Respectfully submitted,

LOUIS ALFORD
WILLIAM A. WILTSHIRE
McComb, Mississippi

Charles Clark

CHARLES CLARK
P. O. Box 1046
Jackson, Mississippi

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE

I, CHARLES CLARK, certify that I have served true copies of the foregoing MOTION AND NOTICE FOR SUBSTITUTION OF PARTIES on Counsel of Record for Defendants, by mail, in accordance with the Federal Rules of Civil Procedure.

THIS 25th DAY OF NOVEMBER, 1963.

Charles Clark

CHARLES CLARK
P. O. Box 1046
Jackson, Miss.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and as Representative of her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi, Plaintiffs	)	
v.	)	No. 3223
THE CONGRESS OF RACIAL EQUALITY, Defendants	)	

ORDER REMANDING CAUSE
TO THE FILES

THIS DAY this cause came on to be heard on the motion of plaintiffs for an order remanding this cause to the files of this Court and the Court being of the opinion that said motion should be sustained, it is hereby,

ORDERED that this cause be and the same is hereby remanded to the files of this court pending further order of the court.

ORDERED AND ADJUDGED this ___ day of NOVEMBER, 1963.

U. S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

C. H. DOUGLAS, Individually and as MAYOR OF THE CITY OF McCOMB CITY, MISSISSIPPI, and MR. AND MRS. AUBREY McGEHEE, Plaintiffs	)	
v.	)	No. 3223
THE CONGRESS OF RACIAL EQUALITY, JOHN DOE AND MARY DOE, Defendants	)	

ORDER SUBSTITUTING PARTIES

THIS DAY this cause came on to be heard on the motion of plaintiffs; and it appearing unto the Court that said motion is well taken, it is, therefore,

ORDERED AND ADJUDGED that Mrs. Aubrey McGehee be substituted as a party to this action as the Representative of Aubrey McGehee, Deceased, and that R. Gordon Burt, Jr. be substituted in his representative capacity as the present Mayor of the City of McComb City, Mississippi in the place and stead of C. H. Douglas in said representative capacity.

ORDERED AND ADJUDGED, this __ day of November, 1963.

_____

U. S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and as Representative of her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi, Plaintiffs	)	
v.	)	No. 3223
THE CONGRESS OF RACIAL EQUALITY, Defendants	)	

MOTION AND NOTICE OF MOTION
TO REMAND CAUSE TO FILES

TO: Carl A. Rachlin, Esq., 280 Broadway, New York 7, New York
Derrick A. Bell, Esq., 10 Columbus Circle, New York 19, N.Y.

ATTORNEYS OF RECORD FOR DEFENDANTS, The Congress of Racial Equality, John Doe and Mary Doe.

You are hereby notified that at 9:00 o'clock A.M. on November 15, 1963 at the U. S. Court House in Jackson, Mississippi, plaintiffs will move this Honorable Court for an order remanding this cause to the files of the Court until further order of the Court.

Respectfully submitted,

LOUIS ALFORD
WILLIAM A. WILTSHIRE
McComb, Mississippi

Charles Clark

CHARLES CLARK
P. O. Box 1046
Jackson, Mississippi

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE

I, CHARLES CLARK, certify that I have served true copies of the foregoing MOTION AND NOTICE OF MOTION TO REMAND CAUSE TO FILES on Counsel of Record for Defendants, by mail, in accordance with the Federal Rules of Civil Procedure.

THIS 25th DAY OF NOVEMBER, 1963.

Charles Clark

CHARLES CLARK
P. O. Box 1046
Jackson, Mississippi

DRAFT
PGC:gvb
10/24/63

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

C. H. DOUGLAS, Individually and as MAYOR OF THE CITY OF MCCOMB CITY, MISSISSIPPI, and MR. AND MRS. AUBREY MCGEHEE,	:	Civil No. 3223/1961
Plaintiffs,	:	ANSWER
-against-	:	
THE CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE,	:	
Defendants.	:	

Congress of Racial Equality, Inc., for itself and on behalf of its members, by its attorney Carl Rachlin, states that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations in the introductory paragraph of the complaint except that it admits that it is incorporated under the laws of New York, and answers the complaint herein as follows:

FIRST: Denies each and every allegation contained in paragraph I of the complaint.

SECOND: Denies each and every allegation contained in paragraph II of the complaint.

THIRD: Denies each and every allegation contained in paragraph III of the complaint.

FOURTH: Denies each and every allegation contained in paragraph IV of the complaint, except that it admits that in United States v. Mayor and Selectment of McComb City, et al., Civil Action No. 3215 (1961), before this Court, officials of McComb City have been enjoined from interfering [with the peaceful use of the interstate bus facilities at McComb City], and that Exhibit "A" is a true copy of that injunction.

Carl: I don't know the exact terms of this order which should be checked.

FIFTH: States that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations in paragraph V of the complaint.

SIXTH: Denies each and every allegation contained in paragraph VI of the complaint.

SEVENTH: Denies the allegation in paragraph VII of the complaint.

Defenses

EIGHTH: For a first separate and distinct defense arising on the face of the complaint herein, defendant Congress of Racial Equality, Inc., says that the facts alleged in said complaint are insufficient

to establish jurisdiction of the subject matter, in that:

(a) The complaint fails to allege facts sufficient for jurisdiction under Title 28, United States Code, Section 1332, because it does not allege the citizenship of all the defendants. [Oster v. Rubinstein, 136 F. Supp. 733. Reminder to counsel.]

(b) The complaint fails to allege facts sufficient for jurisdiction under Title 28, United States Code, Section 1343, because it does not allege that any of the plaintiffs ~~have~~ has been deprived under color of state law, statute, ordinance, custom or usage, ~~or~~ of any right, privilege or immunity secured by the Constitution of the United States, or that any of the plaintiffs ~~have~~ has been injured or threatened with injury by any wrong mentioned in Section 1985 of Title 42, United States Code, or that any of the plaintiffs seeks to protect civil rights, pursuant to any act of Congress.

NINTH: For a second separate and distinct

defense, defendant, Congress of Racial Equality, Inc., says that the facts alleged in the complaint herein are insufficient to state a claim upon which relief can be granted in that:

(a) The facts supporting the allegations in the complaint have been found by the United States Court of Appeals for the Fifth Circuit in Congress of Racial Equality, ~~XXXX~~ et al. v. C. H. Douglas, et al., 318 ~~XXXXX~~ F.2d 95 (1963), cert. den. —— U.S. —— (October 14, 1963), to be insufficient in law to warrant an injunction.

TENTH: For a third separate and distinct defense, defendant, Congress of Racial Equality, Inc., says that the injunction prayed for in the complaint would abridge the rights of defendant, Congress of Racial Equality, Inc., and its members to ~~XX~~ freedom of speech and assembly under the First Amendment to the Constitution of the United States and would deprive it and its members of liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States, ~~and would deprive it and its members~~

ELEVENTH: For a fourth separate and distinct defense, defendant, Congress of Racial Equality, Inc., says that the claim is repugnant to the provisions of Part II of the Interstate Commerce Act, and the Regulations of the Interstate Commerce Commission which prohibits racial discrimination in the facilities of interstate carriers, Title 49, United States Code, section 316(d), and 49 Code of Federal Regulations, Section 180(a).

TWELFTH: For a fifth separate and distinct defense, defendant, Congress of Racial Equality, Inc., says that the injunction prayed for in the complaint would deprive defendant and its members of their rights under the judgment of the United States District Court for the Southern District of Mississippi convened as a statutory three-judge court in the case of United States of America v. The Mayor and Selectmen of McComb City, et al., Civil Action No. 3215 (1961).

THIRTEENTH: ~~As and~~ For a sixth separate and distinct defense, defendant, Congress of Racial Equality, Inc., says that this court lacks jurisdiction of the

subject matter herein, because the amount in controversy for each separate claim of each plaintiff does not exceed $10,000 exclusive of interest and costs. [Steele v. Guaranty Trust, 164 F.2d 387. Reminder.]

FOURTEENTH: As and for a seventh separate and distinct defense, defendant, Congress of ~~XXXXX~~ Racial Equality, Inc., says that plaintiffs have and adequate remedy at law against defendant and its members.

WHEREFORE, defendant, Congress of Racial Equality, Inc., for itself and on behalf of its members demands judgment dismissing the complaint with costs and disbursements of this action.

Dated:

CARL RACHLIN,
Attorney for Defendant,
Congress of Racial
~~XXX~~ Equality, Inc.
280 Broadway
New York, New York

AUG 4 - RECD

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and as Representative of her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi, Plaintiffs	)	
v.	)	No. 3223
THE CONGRESS OF RACIAL EQUALITY, et al. Defendants	)	

MOTION TO DISMISS CAUSE

WITHOUT PREJUDICE

COME NOW the plaintiffs and move the court to dismiss this cause without prejudice and, in support of this motion, would show that on the 26th day of November, 1963 this cause was remanded to the files and since that date and through and including the date of this motion, it has not been reinstated to the regular docket of the court.

Plaintiffs therefore move the court to enter an order dismissing the cause without prejudice.

Respectfully submitted,

LOUIS A. ALFORD
WILLIAM A. WILTSHIRE
McComb, Mississippi

CHARLES CLARK
P. O. Box 1046
Jackson, Mississippi

ATTORNEYS FOR PLAINTIFFS

NOTICE OF MOTION

TO: Carl A. Rachlin, Esq.
280 Broadway
New York 7, New York

Derrick A. Bell, Esq.
10 Columbus Circle
New York 19, New York

ATTORNEYS OF RECORD FOR DEFENDANTS,
The Congress of Racial Equality

You are hereby notified that at 9:00 o'clock A.M. on the 7th day of August, 1964, at the U. S. Courthouse in Jackson, Mississippi, plaintiffs will move this Honorable Court for an order dismissing this cause without prejudice.

Respectfully submitted,

LOUIS ALFORD
WILLIAM A. WILTSHIRE
McComb, Mississippi

Charles Clark

CHARLES CLARK
P. O. Box 1046
Jackson, Mississippi

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE

I, CHARLES CLARK, certify that I have served true copies of the foregoing motion and notice on counsel of record for defendants by mail, in accordance with the Federal Rules of Civil Procedure.

THIS 31st Day of July, 1964.

Charles Clark

CHARLES CLARK
P. O. Box 1046
Jackson, Mississippi

Congress of Racial Equality - CORE
38 Park Row, New York 38, New York

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

----------X
C. H. DOUGLAS, etc., et al.,

Plaintiffs,

CIVIL ACTION

NO.3223

v.

THE CONGRESS OF RACIAL EQUALITY,
JOHN DOE and MARY DOE,

Defendants.
- X

BRIEF FOR DEFENDANT

STATEMENT OF FACTS

On November 25, 1961, a three-Judge Federal Court sitting in the Southern District of Mississippi issued at the request of the United States a preliminary injunction enjoining the maintenance of signs or other segregation practices in the McComb bus terminal by the Mayor, Selectmen and Police Chief of McComb City, Mississippi and from failing or refusing to comply with the recent order of the Interstate Commerce Commission, 49 C.F.R. 1802, requiring the end of racial segregation in all interstate carriers and terminals. United States v. Mayor and Selectmen of McComb City, Civil Action No. 3215.

During the ensuing week, attempts by Negro bus passengers to avail themselves of the McComb City bus terminal facilities on a desegregated basis were met by violent opposition from local white citizens. Some of the riders were assaulted and beaten by mobs as were some newsmen who were present to report the disturbances. McComb City police were hard pressed to maintain order.

On Saturday, December 2nd, the plaintiffs, Mayor of McComb City on behalf of himself and the city along with the proprietors of the McComb City bus terminal restaurant sought and obtained a temporary restraining order against defendant Congress of Racial Equality and others who sponsored or participated in tests aimed at determining whether McComb City officials were complying with the order of the three-Judge Court entered in Civil Action No. 3215.

A hearing on a motion for preliminary injunction was held on Thursday, December 7th, at which time the plaintiffs introduced testimony of several witnesses indicating that after the entry of the three-Judge court order, city officials met on Tuesday, November 28th, and interpreted the order as forbidding any police activity in the area of the bus station. Accordingly, on the following day when a group of five Negroes, admittedly members of defendants' group, sought to purchase tickets at the bus terminal and use the facilities, they were attacked and some were beaten by a mob.

On the following day, Thursday, November 29th, the Mayor received a telegram (Defendants' Exhibit 1) from an official of the United States

Department of Justice advising that compliance with the three-Judge court order required the City to protect persons using the desegregated bus terminal facilities. Witnesses for plaintiffs reported that they immediately complied with this advice with the result that Negroes seeking to use the facilities on Friday, November 30th, and Saturday, December 1st, were able to do so. Crowds gathered, but plaintiffs denied that any assaults were permitted. Nevertheless, plaintiffs argued that chaos would result if the injunction aginst defendant were lifted.

Witnesses, with but one exception, admitted that defendants' members seeking use of terminal facilities were quiet and orderly. One plaintiff, a proprietor of the terminal restaurant testified, however, that when he refused to serve the group of Negroes who sat at his counter on Wednesday, November 28th, there was some banging, and a girl member of the group asked "Why the hell don't you serve us." This witness reported, however, that he had never served Negroes in his restaurant and did not intend to do so.

While the plaintiffs alleged that defendant had sent its members to McComb to create disturbances, provoke the local citizens to violence, and had given advance publicity to news media to further this purpose, there was no testimony offered that supported these charges. The Mayor reported that business in McComb City fell off because of the disturbances, but introduced no figures to support these charges, and loss of business which plaintiff McGehee alleged had led him permanently to close his terminal restaurant was disclosed on cross-examination to have been suffered over the last six months.

Defendant offered several motions at the hearing including: a motion to stay the action and make application for a three-Judge court, a motion to dissolve the temporary restraining order and a statement in opposition to plaintiffs' request for a preliminary injunction, and a motion to dismiss.

MEMORANDUM OF LAW

QUESTION PRESENTED

WHETHER THE PEACEFUL EXERCISE OF FREE SPEECH, TRAVEL AND FREEDOM FROM THE NECESSITY OF USING SEGREGATED FACILITIES IN INTERSTATE COMMERCE MAY BE PROHIBITED BECAUSE SUCH EXERCISE MAY PROVOKE OTHERS TO BREACH OF THE PEACE OR RIOT.

I. Plaintiffs have failed to allege facts giving this court jurisdiction to grant the relief requested.

1. Plaintiffs allegations of jurisdiction under 28 U.S.C. §§ 1343 must fail because defendant is not the state or a state agency and therefore cannot violate plaintiffs' constitutional rights under the Fifth and Fourteenth Amendments.

2. Neither the pleadings nor the proof offered by plaintiffs support these allegations that the amount in controversy as to each of them exceeds $10,000, or that there is complete diversity between each of the plaintiffs and the defendant. Hague v. C.I.O., 307 U.S. 496, 507-508.

3. Since no proof offered by plaintiffs supports the charge that defendant sent its members to McComb to commit criminal acts and to create disturbances and provoke violence, there is no basis for an injunction. An adequate remedy at law exists if individual members of defendant organization are found guilty of such acts.

4. Moreover, injunctions will not be issued to enjoin criminal acts which are not part of a course of continuing conduct. Harkrader v. Wadly, 172 U.S. 148, 19 S. Ct. 119.

5. Plaintiffs have completely failed to show irreparable harm or injury resulting from wrongful conduct of defendant, which failure of itself, bars them from obtaining the injunction relief requested. Mr. McGehee's testimony on this was not worthy of belief. His business had deteriorated long before November 29th, 1961, and had nothing to do with defendants. On this point Mayor Douglas was very vague as to any alleged loss by the City.

6. And it is a fundamental maxim of equity jurisprudence that injunctions will not be issued in favor of parties with unclean hands. Deweese v. Reinhard, 165 U.S. 386, 390, 17 S.Ct. 340, 341. Here, plaintiff McGehee admitted, that although his counter-restaurant is in the bus terminal, he would not serve Negroes, and did not serve the Negro passengers who sought service at his lunch counter on November 28th, which refusal was a clear violation of the Interstate Commerce Commission Order, 49 C.F.R. 180 a, and defendants' members rights under Art. I, Sec. 8 as enacted in 49 U.S.C. 316 (d). See also Boynton v. Virginia, 364 U.S. 454.

The violence precipitated herein in good part can be laid at Mr. McGehee's hands. If he had carried out the law as applied to him, no one can say violence would have taken place. Regardless of his feelings, he should have served them as was his duty. The Mayor's failure to obtain an authoritative interpretation of his duties and responsibilities under the three-Judge court order, while not bearing the culpability of Mr. McGehee's acts, likewise was a direct cause of the only violence shown by plaintiffs that occurred during the test entry into the facilities by defendant. Violence occurring because of such failure cannot now be cited as justification for the injunction relief sought here.

Nor was there a shred of proof offerred by plaintiffs of any proceedings against the mob or its leaders as was done in the very recent case in U.S. v. Klan et al Civil Action No. 1718 - N, U. S. Dist. Ct. for the Middle District of Alabama. No doubt exists at all as to the perpetration of violence.

II. The issues raised by this case may properly be decided only by a three-Judge court, and since such issues are similar to those before the three-Judge court in United States v. Mayor and Selectmen of McComb City, supra, should properly be transferred to that tribunal.

1. The above mentioned case concerns the same subject matter as this case. There are similar issues of law and fact, and the order in that case greatly affects the rights of all parties to this case.

2. The plaintiff Mayor is a party-defendant in the above mentioned case, and the McGehees have a right to intervene in the above mentioned case and assert their claims pursuant to 28 U.S.C. § 2323; defendant has a similar right.

3. Should the Mayor require additional relief because of any experiences since the issuance of the three-Judge injunction, he may apply to that court for a modification, or bring in additional parties who may be leading the mob to violence. But to enjoin defendants herein in essence becomes a limitation upon the injunction issued by the three-Judge court. This case is not unlike U.S. v. U.S. Klans, et al, U.S. Dist. Ct., Middle Dist. of Alabama, No. Div.

4. The rules of comity require that this Court refrain from granting relief here which would conflict and deprive defendant of relief obtained in the above mentioned case.

5. Granting the relief sought by plaintiffs here would deprive defendant and its members of rights granted by 49 C.F.R. 180 a, and thus under 28 U.S.C. §§ 2325 may be obtained only from a three-Judge court. Lambert Run Coal Co. v. B&O R.R., 258 U.S. 377.

III. The injunctive relief sought by Plaintiffs, if granted, would violate rights guaranteed to Defendant and its members by the Constitution of the United States.

1. The relief requested would constitute a burden on commerce contrary to the commerce clause of the Constitution, Art. I, Sec. 2, Clause 8, and would violate the provisions of Part II of the Interstate Commerce Act, particularly the provisions of that Act and the Regulations of the Interstate Commerce Commission issued pursuant thereto prohibiting racial discrimination in the facilities of interstate carriers, to wit, 49 U.S.C. §§ 316 (d), and 49 Code of Federal Regulations, part 180 (a) as amended, which provisions have been interpreted to support defendants' contention in Henderson v. United States, 339 U.S. 816; Keys v. Carolina Coach Co., 64 M.C.C. 769; Boynton v. Virginia, 364 U.S. 454, Morgan v. Virginia, 328 U.S. 373.

2. The relief requested would violate defendant members' rights under the First Amendment to the Constitution (since Federal officials would issue and enforce the injunction) to freedom of speech, freedom of the press, freedom of peaceable assembly and freedom of association, and would (since the relief is requested by state officials) abridge similar rights guaranteed by the due process clause of the Fourteenth Amendment. De Jonge v. Oregon, 299 U.S. 353; NAACP v. Alabama, 357 U.S. 449.

3. An injunction against defendant and its members so requested by plaintiffs would enforce racial segregation and discrimination contrary to the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, (e.g. since McGehee refused to serve Negroes contrary to law, any such injunction would uphold such illegal discrimination) and contrary to the provisions and laws of the United States providing for the equal rights of citizens, to wit, 42 U.S.C. §§ 1981, 1982, and 1983 as interpreted in Baldwin v. Morgan, 251 F. 2d 780 (5th Civ. 1958), 287 F. 2d 750 (5th Civ. 1961); Mitchell v. United States, 313 U.S. 80; Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956) affirmed, 352, U.S. 903; Roman v. Birmingham Transport Co., 280 F. 2d 531 (5th Civ. 1960).

4. An injunction against defendant and its members as requested by plaintiffs would abridge their rights under the due process clause of the Fifth Amendment in that the injunction requested is so vague, uncertain and indefinite that it does not sufficiently describe the conduct prohibited, and fails to meet the requirements of due process. This is particularly so since any violation herein depends upon the state of mind of the mob and so contempt would be measured by the act of others. Furthermore, it would be impossible to determine the state of mind of any traveler, innocent or guilty, unless someone were to state guilt. This has not been shown nor is it the fact. Swift & Co. v. U.S., 196 U.S. 375, 396, which held:

> "... we are equally bound, by the first principles of justice, not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law.

We must steer between these opposite difficulties as best we can."

5. To grant the relief requested by plaintiffs would deprive defendant and its members of their right to liberty of travel and movement under the due process clause of the Fifth Amendment and the due process, 2nd privileges and immunities clauses of the Fourteenth Amendment. See: Kent v. Dulles, 357 U.S. 116; Edwards v. California, 314 U.S. 160; Crandall v. Nevada, 6 Wall. 35.

6. Defendant and its members may not be enjoined from the exercise of federally protected rights because their activities would cause unlawful action from others who seek to suppress or punish them. Cooper v. Aaron, 358 U.S.1; Buchanan v. Worley, 245 U.S. 60; Sellers v. Johnson, 163 F.2d 877 (8th Civ. 1947), cert. denied, 332 U.S. 851; Rockwell v. Morris, 211 N.Y.S. 2d 25 (1961), cert. denied, 30 Law Week 3154. This in effect becomes a kind of blackmail; crowds threaten Violence, therefore enjoin the speaker or the traveler and encourage illegal mob activities.

7. Defendants' activities do not contain the element of active incitement present in those cases where the Supreme Court has upheld curbs on constitutional rights to protect public safety, e. g., Feiner v. New York, 340 U.S. 315, where the Court emphasized that Feiner actively exceeded the bounds of argument or persuasion and undertook incitement to riot. See also Terminiello v. Chicago, 337 U.S. 1.

Note: The cited cases dealt with a criminal prosecution for breach of the peace undertaken after a situation of great peril had developed which could be controlled only by requesting the speaker to desist after he had begun to speak and upon his refusal, by arresting him. The order requested here would, on the other hand, be in the nature of that most disfavored of all devices in our legal system -- a prior restraint. Rockwell v. Morris, supra.

Therefore for the foregoing reasons, the temporary restraining order should be dissolved, the plaintiffs' motion for preliminary injunction should be denied, and the defendants' motion to dismiss should be granted.

Respectfully submitted,

CARL RACHLIN, ESQ.
280 Broadway
New York, New York

DERRICK A. BELL, ESQ.
10 Columbus Circle
New York, New York

Jack Greenberg, Esq.
Wiley Branton, Esq.
James M. Nabritt, III, Esq.
of Counsel

To: Mr. Carl Rachlin
280 Broadway
New York, N.Y.

From: Miss Brenda Soloff
Legal Survey
Columbia University, Law School
New York, N.Y.

Re: The Freedom Riders: Obtaining a Writ of Certiorari to the United States Supreme Court

February, 1962

FACTS

The Freedom Riders' aim was to discourage racial segregation at interstate bus terminals, rest rooms, restaurants and similar facilities in southern states. Under the sponsorship of CORE, they began in May, 1961 to travel south in racially mixed groups. According to CORE national director James Farmer, "If there is arrest, we will accept that arrest, and if there is violence, we are willing to receive that violence without responding in kind." N.Y. Times, May 5, 1961, p. 1.

The facilities being tested at that time, all in interstate terminals, should have been unsegregated, under Interstate Commerce Commission rulings and implementing decisions. More recently, the Riders have begun to test roadside restaurants outside the scope of the Interstate Commerce Commission control. The latter situation will not be discussed in this paper.

On May 8, eight Riders were arrested for trespass in a terminal barbershop in North Carolina. On May 17, following violence in Anniston, Alabama, fourteen Riders were held in protective custody, two more for failure to obey an officer and one for interfering with an officer. There followed in Alabama more violence and threats of violence, the dispatch of federal marshals and some arrests for breach of the peace in refusing to obey an officer.

From Alabama, the Freedom Riders went to Mississippi,

going first to the bus terminal in Jackson where there were white and colored intrastate waiting rooms but no unsegregated one for interstate travelers. Generally, as soon as they entered the white waiting room the Riders were told by a police captain one or more times to move on. Refusal at first or after several orders was followed by arrest for disorderly conduct. On May 26, James Farmer and twenty-six others were convicted and on May 28, seventeen more Riders were arrested.

On May 30, Attorney-General Kennedy asked the Interstate Commerce Commission to adopt more stringent regulations against segregation in waiting rooms, rest rooms and eating places in interstate terminals because existing rules were not being enforced.

On August 5, four Riders were arrested in Shreveport, Louisiana for disturbing the peace after they had ignored police orders to move on.

On September 14, fifteen Episcopal ministers of both races were arrested in Jackson for refusing to move on from a terminal restaurant.

On September 23, the Interstate Commerce Commission promulgated the rules requested by the Attorney-General. Effective November 1, 1961 interstate carriers were forbidden to use terminal facilities segregating travelers by race.

On November 21, a three-judge federal district court declared unconstitutional Mississippi laws requiring se-

gregation in transportation stations and granted an injunction ordering the removal of signs designating separate waiting rooms.

In all, over three hundred Freedom Riders were arrested in Jackson from May 24 on.

The above is a very brief tracing of the Freedom Riders summarized largely from the New York Times, May, 1961 through November, 1961 and is meant to show the legal and emotional climates at the time of the Rides as well as to indicate the highlights of their history.

ISSUES

1-Are Mississippi Code section 2087.5 and L.S.A.-R.S. 14:103.1, the disorderly conduct statutes under which the Freedom Riders have been arrested in interstate terminals, rest rooms and restaurants, unconstitutional either on their face or as construed?

(a) Are they void for vagueness?

(b) Do they delegate unreasonable and arbitrary power to the police?

2-A re the statutes unconstitutional as appliedto the Freedom Riders?

(a) Is there such lack of evidence as to render the arrests and convictions a deprivation of Due Process under the Fourteenth Amendment?

(b) Is the enforcement of the statutes under the

circumstances an enforcement of a discriminatory policy and thus a deprivation of Equality under the Fourteenth Amendment?

3-Do the arrests and convictions constitute a burden on Interstate Commerce?

4-Do the arrests and convictions violate first amendment rights of freedom of expression?

CONCLUSIONS

The statutes are not void for vagueness, nor do they delegate unreasonable and arbitrary power to the police either on their face or as construed. The sufficiency of evidence will depend on the record submitted to the Court and after the Garner v. Louisiana warning it is to be expected that at least some evidence will be presented to sustain the convictions. It can be shown that both states have a policy of segregation and some evidence can be produced to show that the statutes had a discriminatory aim. Under those circumstances it should be urged that because of overriding constitutional questions, the statutes as applied are unconstitutional. It also might be shown that the police action places an unconstitutional burden on interstate commerce and that it interferes with freedom of expression. Both of the latter arguments have the advantage of definiteness lacking in the broader overriding question argument.

DISCUSSION

1-Are Mississippi Code section 2087.5 and L,S.A.-R.S. 14:103.1, the disorderly conduct statutes under which the Freedom Riders have been arrested in interstate terminals, rest rooms and restaurants, unconstitutional either on their face or as construed?

(a) Are they void for vagueness?

The Mississippi and Louisiana statutes were passed in April and June, 1960 respectively. Mississippi Code section 2087.5 as relevant to this situation is:

> 1. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of peace may be occasioned thereby:
> (1) Crowds or congregates with others in or on shore protecting structure or structures, or a public street, highway, sidewalk, or in any place of business engaged in selling or serving members of the public or in or around any free entrance to any such place of business...and who fails to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of the State of Mississippi, or any other authorized person
> shall be guilty of disorderly conduct, which is made a misdemeanor....

The Louisiana statute, L.S.A.-R.S. 14:103.1, is essentially like the Mississippi statute differing only in that Louisiana adds that the provision shall not apply to lawful picketing.

These statutes are almost certainly not void for vagueness. They list very specifically the type of action or non-action constituting the offense, naming places and parts of places as well as being careful enough to separate dispersal and removal. See also reaching this conclusion

Wollett, Race Relations, 21 La. L. R. 85, 96 (1960).

The only possible arguments against construing the statutes to apply to the Freedom Riders are (1) the fact that they do not specifically mention terminals and (2) the fact that "congregates" assumes a certain minimum number in a group. But these objections are easily met. It is not a great strain to bring terminals within the listed areas and almost always there were enough Riders to come within any definition of "congregates."

(b) Do they delegate unreasonable and arbitrary authority to the police?

Usually statutes like this are not considered to vest arbitrary authority in the police. New York has a breach of the peace statute with a provision very much like the Mississippi and Louisiana provisions cited, supra. New York Penal Code section 722:

> Any person who with the intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> (3) congregates with others on a public street on a public street and refuses to move on when ordered by the police.

It has been held that this statute does not vest arbitrary and discriminatory power in the police. People v. Hussock, 23 N.Y.S.2d 520, 6 Misc. 2d 182 (1940) cert. den. 61 S.Ct. 733 (1941)(Ct. of Special Sessions). The scope of a policeman's discretion is indicated by People v. Galpern, 259 N.Y. 279, 181 N.E. 572, 83 A.L.R. 785 (1932),

in which the order to move on, given to five or six people on the street congregating in an otherwise inoffensive manner was sustained as given in the performance of his duty to prevent sidewalk obstruction.

Similarly it could be argued that any order given to move on from any of the places listed in Mississippi and Louisiana would merely be in pursuit of a definite duty to keep that place unobstructed.

2-Are the statutes unconstitutional as applied to the Freedom Riders?

(a) Is there such lack of evidence as to render the arrests and convictions a deprivation of Due Process under the Fourteenth Amendment?

The sufficiency of evidence in any one case will depend on the record submitted to the court. Garner v. Louisiana, U.S., 82 S.Ct. 248, 7 L.Ed. 2d 207 (1961), the recent "sit-in" case turned, for the majority, Chief Justice Warren writing, on the fact that the Court could find no evidence to sustain the convictions and concluded that under Thompson v. City of Louisville, 362 U.S. 199, 80 S. Ct. 624 (1960) petitioners had therefore been deprived of due process. The Court could find no evidence of violation of L.S.A.-R.S. 14:103:

> Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public:
> (7) commission of any other act is such manner as to unreasonably disturb or alarm the public.

The court also said that any evidence to sustain the con-

victions would have had to come from judicial notice of the general racial situation, notice which was never taken.

In the Freedom Rider situations the failure to move on is a specific offense and easily demonstrated. There is still needed evidence to show that the arrests were at least "under circumstances such that a breach of the peace may be occasioned..." It seems likely that after the warning of Garner v. Louisiana, supra, courts of record will be sure to take judicial notice , especially in Louisiana where under L.S.A.-R.S. 15:422(6) the state courts may take judicial notice of "social and racial conditions prevailing in [the] state." In Mississippi, in the May 26, 1961 Farmer conviction, the Municipal Court of Jackson took judicial notice of the happenings in "sister states," 6 Race Rel. L. R. 544. Furthermore, even in Garner, both Justices Douglas and Harlan felt that such notice must have been taken and that its taking did not, in itself, deprive petitioners of any constitutional rights.

It would seem, then, that the next cases will present sufficient evidence to overcome Garner objections.

(b) Is the enforcement of the statutes under the circumstances an enforcement of a discriminatory policy and thus a deprivation of Equality under the Fourteenth Amendment?

The analysis so far indicates that in the next cases the Supreme Court will be faced with a situation where there is sufficient evidence to sustain a finding that

the presence of Riders in the terminals and terminal restaurants could reasonably lead to a breach of the peace under a statute valid on its face and as construed. Therefore, if the statutes are still to be unconstitutional as applied, it must be shown that their function was to preserve and further a discriminatory policy.

There is no direct evidence available that the statutes were passed to facilitate segregation. But it might well be argued that such was clearly their purpose. Both were passed in the spring of 1960 on top of already existing breach of the peace statutes and after the first "sit-ins." In Louisiana, for example, the statute was part of a general legislative scheme of thirty-five acts and four constitutional amendments relating to such crimes as mischief, trespass and obstruction of public passage. The net effect was to make participation in "sit-ins" very hazardous. Wollett, supra. Furthermore, both states do have a definite, legislatively expressed policy of segregation. For example both have statutes requiring segregated terminal waiting rooms, Mississippi Code sec. 2351.5 and L.S.A.-R.S. 45:522.

In light of these statutes it must also be noted that any discrimination in this area constitutes state action. There can be no discrimination in interstate terminals, NAACP v. St. Louis-San Francisco RR., 297 ICC 335 (1955) or in terminal restaurants, Boynton v. Virginia, 364 U.S. 409, 81 S. Ct. 182 (1960). Thus there is no

question of state enforcement of the right of private discrimination, that right does not exist in these cases.

There are still two stumbling blocks: 1. there is not any direct evidence that the statutes are discriminatory in design and 2. there is the probability that enough evidence will be introduced to show reasonable apprehension of a breach of the peace.

Under such circumstances it would seem well to urge Justice Douglas' approach in his concurring opinion in Garner V. Louisiana, 82 S. Ct. 248 at 258-9. After construing the relevant statute, supra, to include petitioners' conduct he says:

> This does not mean that the police were justified in making these arrests. For the police are supposed to be on the side of the Constitution, not on the side of discrimination. Yet if all constitutional questions are to be put aside and the problem treated merely in terms of disturbing the peace, I would have difficulty in reversing these judgments. I think, however, the constitutional questions must be reached and that they make reversal necessary.

This is really an approach requiring consideration of overriding constitutional questions. It seems to regard as implied that which cannot be directly stated, that the statute was passed to preserve segregation, and that being so it does not matter that there is evidence to sustain the arrests and convictions under the statute because constitutional considerations make any convictions for such purposes void and the statute unconstitutional at least as applied to the Riders. This approach is broader than what the Court normally likes to use but it seems

the only course available in an application argument.

3-Do the arrests and convictions constitute a burden on Interstate Commerce?

The Interstate Commerce Act, 49 U.S.C. sec. 3(1) prohibits discrimination by carriers and 49 U.S.C. secs. 203(a) and 216 include under this prohibition all "services" furnished by the carriers. These rules have long been implemented by decisions, NAACP v. St. Louis-San Francisco R.R., supra and Boynton v. Virginia, supra. Here there is no accusation of direct discrimination by the carrier, but by the state and city. But it has been held that a state policy interfering with commerce burdens commerce under Artide I section 8 of the Constitution as much as any carrier regulation to that effect. Morgan v. Virginia, 328 U.S. 373, 66 S.Ct. 1050, 165 A.L.R. 574 (1946) (state statute requiring seat changes to effect segregation in buses travelling through state unduly burdened Commerce.)

The effect of the state action is to make certain groups of people liable for arrest immediately on entering a Louisiana or Mississippi terminal. Since the terminals may not discriminate, they should not provide separate facilities. The police order each group of Riders to move on, ostensibly to prevent any breach of the peace, from a place where by law they have every right to be. The effect of this is not only to maintain separate facilities but to deny to mixed groups any terminals facilities whatever. Under Morgan and Boynton, supra, this result would seem

In Rockwell, the leader of the American Nazi Party was denied a permit to address a July 4 rally in New York City. Judge Breitel of the Appellate Division said that denial of the permit without fixing an alternate date and place was unconstitutional. He said 211 N.Y.S. 2d 25 at page 35:

> A community need not wait to be subverted by strect riots and storm-troopers, but also, it cannot, by its policemen and commissioners, suppress a speaker in prior restraint, on the basis of news reports, hysteria or inference....Thus too, if the speaker incites others to immediate unlawful action he may be punished-in a proper case, stopped when disorder actually impends, but this is not to be confused with unlawful action from others who seek unlawfully to suppress or punish the speaker.
> Only is Rockwell speaks criminally...can his right to speak be cut off.

Read together these cases indicate that speech not urging criminal acts must be protected at least up to the point of actual violence. Rockwell was not decided by the Supreme Court on the merits but is probably sound law as to the extent of freedom of expression. In the Freedom Rider situation there was neither inciting to riot nor proof of a "restless" audience, when the arrests were made.

Thus, absent any statute, there existed a right to express ideas not in themselves criminal. But the question becomes one of statutory construction. As Justice Harlan said in Garner v. Louisiana, supra, at pages 272-3:

> (W)hen a State seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the fourteenth amendment, ~~it~~ cannot do so by means of a general

> and all-inclusive breach of the peace prohibition.
> In so concluding, I intimate no view as to whether Louisiana could by a specifically drawn statute prosecute conduct of the kind evinced in these two cases, or upon the constitutionality of the statute which the State has recently passed.

Thus we must pick up where Justice Harlan left off. The statutes are, as indicated on page 6 of this paper more specific than any statute yet enacted and were probably an attempt to escape decisions like Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 128 A.L.R. 1352 (1940). Presumably the argument is that specificity gives fair warning of the consequences of an otherwise lawful exercise of right. But it can still be argued that allowing specificity to be the final word on the matter defeats the purpose of the first and fourteenth amendments since many rights could then be curtailed. Free expression has, for good reason, traditionally required strong safeguards and a strong showing of danger to limit it. It might well be said that conduct "such that a breach of the peace may be occasioned," that is the invoking of the "apologetics of the police power," Morgan v. Virginia, supra, even coupled with a specific kind of offense, such as failure to move on, does not require a strong enough showing of possible harm to defeat so important a right.

This argument, and the commerce argument are narrower in scope that the overriding question argument and may hold more appeal for the court for that reason. However all three approaches are possible and present federal questions which the Court can consider on a petition for certiorari.

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1/16/62 - mailed original brief to Cynthia Hendelson -

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

- - - -

passengers to avail themselves of the McComb City bus terminal facilities on a desegregated basis were met by violent opposition from local white citizens. Some of the riders were assaulted and beaten by mobs as were some newsmen who were present to report the disturbances. McComb City police were hard pressed to maintain order.

On Saturday, December 2nd, the plaintiffs, Mayor of McComb City on behalf of himself and the city along with the proprietors of the McComb City bus terminal restaurant sought and obtained a temporary restraining order against defendant Congress of Racial Equality and others who sponsored or participated in tests aimed at determining whether McComb City officials were complying with the order of the three-judge Court entered in Civil Action No. 3818.

A hearing on a motion for preliminary injunction was held on Thursday, December 7th, at which time the plaintiffs introduced testimony of several witnesses indicating that after the entry of the three-judge court order, city officials met on Tuesday, November 28th, and interpreted the order as forbidding any police activity in the area of the bus station. Accordingly, on the following day, when a group of five Negroes, admittedly members of defendant group, sought to purchase tickets at the bus terminal and use the facilities, they were attacked and some were beaten by a mob.

On the following day, Thursday, November 29th, the Mayor received a telegram (Defendants' Exhibit 1) from an official of the United States Department of Justice advising that compliance with the three-Judge court order required the City to protect persons using the desegregated bus terminal facilities. Witnesses for plaintiffs reported that they immediately complied with this advice with the result that Negroes seeking to use the facilities on Friday, November 30th, and Saturday, December 1st, were able to do so. Crowds gathered, but plaintiffs denied that any assaults were permitted. Nevertheless, plaintiffs argued that chaos would result if the injunction against defendant were lifted.

Witnesses, with but one exception, admitted that defendants' members seeking use of terminal facilities were [illegible] orderly. One plaintiff, a proprietor of the [illegible] testified, however, that when he refused to serve the group of Negroes who sat at his counter on Wednesday, November 28th, there was some hanging, and a girl member of the group asked "why the hell don't you serve us." This witness reported, however, that he had never served Negroes in his restaurant and did not intend to do so.

While the plaintiffs alleged that defendant had sent its members to Nichols to create disturbances, provoke the local citizens to violence, and had given advance publicity to news media to further this purpose, there was no testimony offered that supported these charges. The record

reported that business in McComb City fell off because of the disturbances, but introduced no figures to support these charges, and loss of business which plaintiff McGehee alleged had led him permanently to close his terminal restaurant was disclosed on cross-examination to have been suffered over the last six months.

Defendant offered several motions at the hearing including: a motion to stay the action and make application for a three-Judge court, a motion to dissolve the temporary restraining order and a statement in opposition to plaintiffs' request for a preliminary injunction, and a motion to dismiss.

[redacted]

WHETHER THE PEACEFUL EXERCISE OF FREE SPEECH, TRAVEL AND FREEDOM FROM THE [redacted] OF RACIALLY SEGREGATED FACILITIES IN INTERSTATE COMMERCE MAY BE PROHIBITED BECAUSE SUCH CONDUCT MAY INCITE[redacted]

I. Plaintiffs have failed to allege facts giving this court jurisdiction to grant the relief requested.

1. Plaintiffs allegations of jurisdiction under 28 U.S.C. § 1343 must fail because defendant is not the state or a state agency and therefore cannot violate plaintiffs' constitutional rights under the Fifth and Fourteenth Amendments.

2. Neither the [redacted]

offered by plaintiffs support their allegations that the amount in controversy as to each of them exceeds $10,000, or that there is complete diversity between each of the plaintiffs and the defendant. Snyder v. C.I.O., 307 U.S. 496, 507-508.

3. Since no proof offered by plaintiffs supports the charge that defendant sent its members to Hoboken to commit criminal acts and to create disturbances and provoke violence, there is no basis for an injunction. An adequate remedy at law exists if individual members of defendant organization are found guilty of such acts.

4. Moreover, injunctions will not be issued to enjoin criminal acts which are not part of a course of continuing conduct. Spielman v. Hildz, 178 U.S. 148, 19 S.Ct. 119.

5. Plaintiffs have completely failed to show irreparable harm or injury resulting from wrongful conduct of defendant, which failure of itself, bars them from obtaining the injunction relief requested. Mr. Hoffman's testimony on this was not worthy of belief. His business had deteriorated long before November 20th, 1937, and had nothing to do with defendants. On this point Mayor Bonnet was very vague as to any alleged loss by the City.

6. And it is a fundamental maxim of equity jurisprudence that injunctions will not be issued to [illegible] or parties with unclean hands. [illegible]

-6-

306, 309, 17 S.Ct. 340,341. There, plaintiff Mathews admitted that although his counter-restaurant is in the bus terminal, he would not serve Negroes, and did not serve the Negro passengers who sought service at his lunch counter on November 20th, which refusal was a clear violation of the Interstate Commerce Commission Order, 49 C.F.R. 180 a, and defendants' members rights under Art. I, Sec. 8 as granted in 49 U.S.C. 316(d). See also Morgan v. Virginia, 328 U.S. 454.

The violence precipitated herein in great part can be laid at Mr. Mathes's hands. If he had carried out the law as applied to him, no one can say violence would have taken place. Regardless of his feelings, he should have served them as was his duty. The buyer's failure to obtain an authoritative interpretation of his duties and responsibilities under the three-judge court order, while not barring the culpability of Mr. Mathes's acts, likewise bars a direct cause of the only violence shown by plaintiffs that occurred during the test entry [illegible] by defendant. Violence occurring because of such defiance cannot now be cited as justification for the [illegible] relief sought here.

Nor was there a shred of proof submitted by plaintiffs of any proceedings against the cab or bus boycott as was done in the very recent case in Lake v. Klein, et al, Civil Action No. 1718 - N, U.S. Dist. Ct., [illegible]

District of Alabama. No doubt exists at all as to the perpetration of violence.

II. The issues raised by this case may properly be decided only by a three-judge court, and since such issues are similar to those before the three-judge court in United States v. Mayor and Selectmen of Hobson City, supra, should properly be transferred to that tribunal.

1. The above mentioned case concerns the same subject matter as this case. There are similar issues of law and fact, and the order in that case greatly affects the rights of all parties to this case.

2. The plaintiff Mayor is a party-defendant in the above mentioned case, and the defendants have a right to intervene in the above mentioned case and assert their claims pursuant to 28 U.S.C. § 2323; defendant has a similar right.

3. Should the Mayor require additional relief because of any experiences since the issuance of the three-judge injunction, he may apply to that court for a modification for bring in additional parties who may be leading the mob to violence. But he cannot defendants have in in essence become a limitation upon the injunction issued by the three-judge court. This case is not within Hobson, et al., U. S. Dist. Ct., Middle Dist. of Alabama, No.

4. The rules of comity require that this Court refrain from granting relief here which would conflict and deprive defendant of relief obtained in the above mentioned case.

5. Granting the relief sought by plaintiffs here would deprive defendant and its members of rights granted by 49 C.F.R. 180a, and thus under 28 U.S.C. § 2325 may be obtained only from a three-Judge court. Lambert Run Coal Co. v. B&O R.R., 258 U.S. 377.

III. The injunctive relief sought by Plaintiffs, if granted, would violate rights guaranteed to Defendant and its members by the Constitution of the United States.

1. The relief requested [illegible] a burden on commerce contrary [illegible] of the Constitution, Art. I, Sec. 8, Clause 3, and would violate the provisions of Part II of the Interstate Commerce Act, particularly the provisions of that Act and the regulations of the Interstate Commerce Commission issued pursuant thereto prohibiting racial discrimination in the facilities of interstate carriers, to wit, 49 U.S.C. § 316(d) and 49 Code of Federal Regulations, part 180(a) [illegible], which provisions have been interpreted to support [illegible] contention in Henderson v. United States, 339 U.S. 816; Mitchell v. Carolina Coach Co., 66 M.C.C. 709; Johnson v. [illegible], 344 U.S. 454; Morgan v. Virginia, 328 U.S. 373;

2. The relief requested would violate defendant members' rights under the First Amendment to the Constitution (since federal officials would issue and enforce the injunction) to freedom of speech, freedom of the press, freedom of peaceable assembly and freedom of association, and would (since the relief is requested by state officials) abridge similar rights guaranteed by the due process clauses of the Fourteenth Amendment. De Jonge v. Oregon, 299 U.S. 353; NAACP v. Alabama, 357 U.S. 449.

3. An injunction against defendant and its members as requested by plaintiffs would enforce racial segregation and discrimination contrary to the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, (e.g. since McGehee refused to serve Negroes contrary to law, any such injunction would uphold such illegal discrimination) and contrary to the provisions and laws of the United States providing for the equal rights of citizens, to wit, 42 U.S.C. § 1981, 1982, and 1983 as interpreted in Baldwin v. Morgan, 251 F.2d 780 (5th Cir. 1958), 287 F.2d 750 (5th Cir. 1961); Mitchell v. United States, 313 U.S. 80; Bynum v. Smith, 142 F. Supp. 707 (M.D. Ala. 1956) affirmed, 352 U.S. 922; Bynum v. Birmingham Transport Co., 252 F.2d 228 (5th Cir. 1958).

4. An injunction against defendants and its members as requested by plaintiffs would abridge their rights

under the due process clause of the Fifth Amendment in that the injunction requested is so vague, uncertain and indefinite that it does not sufficiently describe the conduct prohibited, and fails to meet the requirements of due process. This is particularly so since any violation herein depends upon the state of mind of the mob and so contempt would be measured by the act of others. Furthermore, it would be impossible to determine the state of mind of any traveler, innocent or guilty, unless someone were to state guilt. This has not been shown nor is it the fact. Swift & Co. V. Wells, 196 U.S. 375, 396, which held:

> "... we are equally bound, by the first principles of justice, not to constitute a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties as best we can."

5. To grant the relief requested by plaintiffs would deprive defendant and its members of their right to liberty of travel and movement under the due process clause of the Fifth Amendment and the due process, and privileges and immunities clauses of the Fourteenth Amendment. See: Kent v. Dulles, 357 U.S. 116; Aptheker v. California, 314 U.S. 500; Crandall v. Nevada, 6 Wall. 35.

6. Defendant and its members may not be enjoined from the exercise of Federally protected rights

because their activities would cause unlawful action from others who seek to suppress or punish them. Cooper v. Aaron, 358 U.S.1; Buchanan v. Warley, 245 U.S. 60; Sellers v. Johnson, 163 F.2d 877 (8th Civ. 1947), cert. denied, 332 U.S. 851; Rockwell v. Morris, 211 N.Y.S. 2d 25 (1961), cert. denied, 30 Law Week 3154. This in effect becomes a kind of blackmail; crowds threaten violence, therefore enjoin the speaker or the traveler and encourage illegal mob activities.

7. Defendants' activities do not contain the element of active incitement present in those cases where the Supreme Court has upheld curbs on constitutional rights to protect public safety, e.g., Feiner v. New York, 340 U.S. 315, where the Court emphasized that Feiner actively exceeded the bounds of argument or persuasion and undertook incitement to riot. See also Terminiello v. Chicago, 337 U.S. 1. Note: The cited cases dealt with a criminal prosecution for breach of the peace undertaken after a situation of great peril had developed which could be controlled only by requesting the speaker to desist after he had begun to speak and upon his refusal, by arresting him. The order requested here would, on the other hand, be in the nature of that most disfavored of all devices in our legal system -- a prior restraint. Rockwell v. Morris, supra.

Therefore for the foregoing reasons, the temporary restraining order should be dissolved, the plaintiffs' motion for preliminary injunction should be denied, and the defendants' motion to dismiss should be granted.

Respectfully submitted,

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